CASES

ARGUED AND DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS

OF THE

STATE OF MISSOURI

FROM APRIL 10, 1876, TO JULY 3, 1876.

REPORTED BY

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JUDGES

OF THE

ST. LOUIS COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

HON. THOMAS T. GANTT, *Presiding Judge.*

HON. EDWARD A. LEWIS, } *Judges.*
HON. ROBERT A. BAKEWELL, }

JOSIAH THORNBURGH, ... *Clerk.*

A. MOORE BERRY, ... *Reporter.*

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CASES

ARGUED AND DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS.

MARCH TERM, 1876.

BASIL DUKE *et al.*, Appellants, *v.* ASA HARPER *et al.*, Respondents.

April 10, 1876.

A contract between an attorney and client that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property as compensation for his services, there being no agreement that the attorney should advance costs or furnish money, is not void in Missouri for champerty. *Semble* that it would not be void even were an agreement to advance costs part of the contract.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Davis, Thoroughman & Warren, for appellants, cited: 4 Bl. Com. 135; Chitty on Con. (5th Am. ed.) 675; Evans *v.* Bell, 6 Dana, 179; Wilhite *v.* Roberts, 4 Dana 172; Cain *v.* Warford, 33 Md. 23; Mahoney *v.* Bergin, 41 Cal. 423; Hoyt *v.* Thompson, 1 Seld. 347; Bayard *v.* McLane, 3 Harr. (Del.) 139; Major *v.* Gibson, 1 Patt. & H. 48; Tapley *v.* Coffin, 12 Gray, 420; Huffman *v.* Vallejo, 45 Cal. 564; Martin *v.* Clark, 8 R. I. 389; Northcraft *v.* Martin, 37 Mo. 361.

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Martin & Lackland, for respondents, cited: Stanley *v.* Jones, 7 Bing. 369; Thurston *v.* Percival, 1 Peck, 415; Lathrop *v.* Amherst Bank, 9 Metc. 489; Bird *v.* Odam, 9 Ala. 755; Halloway *v.* Lain, 7 Port. 488; Key *v.* Vattier, 1 Harry, 58; Loffutt *v.* Jelly, 22 Md. 471; Boardman *v.* Thompson, 35 Iowa, 487; Grill *v.* Levy, 61 C. B. (N. S.) 72; Underwood *v.* Reby, 19 Wis. 412; Baker *v.* Lane, 14 Wis. 131; Croly *v.* Ross, 13 Ind. 201; Elbeck *v.* McLelland, 17 Aa. 206.

BAKEWELL, J., delivered the opinion of the court.

The petition in this case states that plaintiffs are attorneys at law; that defendants claimed to be owners, as tenants in common in fee of the undivided three-fifths of certain real estate in St. Louis county, fully described, devised to defendants by one Eliza Haycraft, and also of certain personal property as legatees and heirs at law of said Haycraft; that certain persons named in the petition were in possession of the said real estate and personal property, under conveyances alleged to have been executed by said Haycraft to them; that defendants, being desirous of recovering said real estate and personal property, and of retaining the professional services of plaintiffs for that purpose, entered into an agreement in writing with plaintiffs, dated June 3, 1872, whereby it was agreed between plaintiffs and defendants that, in consideration of the service of plaintiffs, to be rendered as therein, defendants would convey to plaintiffs one-fourth part of so much of the several shares of said defendants of said real estate and personal property as might be recovered from said adverse claimants, whether by suit or compromise, or otherwise, and would make all proper conveyances for the assurance of said interest and shares of said property to plaintiffs; plaintiffs to be the exclusive judges of what suits or proceedings should be instituted for the recovery of the rights of defendants in the premises, and defendants engaging plaintiffs as their attorneys at law in the prem-

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ises. Plaintiffs agreed that they would diligently proceed with the prosecution of such suits and proceedings as they should deem proper for the attainment of the rights of defendants in said property in controversy, and prosecute the same to a final determination in courts having jurisdiction, for the compensation so as aforesaid to be paid to them, and, in case nothing was recovered by said proceedings or by compromise, plaintiffs would charge nothing for their service. Plaintiffs allege that, in accordance with the agreement, they did institute proceedings and proper and fit suits, and duly prosecuted the same in the proper courts, and were ready, willing, and able to prosecute them to a final determination, and fully performed all the terms of said agreement on their part; but that, while the suits so commenced were pending, defendants wrongfully and fraudulently assigned their claims and title interest to said personal property and real estate to the said adverse claimants, the defendants in said pending suits, and dismissed said suits, thereby preventing plaintiffs from prosecuting the same, from recovering said property, and from receiving of defendants one-fourth of their several shares of the same, under said agreement. Plaintiffs say this property is worth $150,000, and defendants' share thereof $90,000, and that, by reason of the premises, they have been damaged in the sum of $22,500, for which they ask judgment.

Defendants demurred to the petition of plaintiffs, and for grounds of their demurrer allege:

1. That said petition does not set forth facts sufficient to constitute a cause of action.

2. That the contract on which the suit is founded is champertous, void, and illegal.

This demurrer was sustained in the Circuit Court, and final judgment entered, on the demurrer, in favor of defendants. The cause is brought to this court by appeal.

This record presents but one question for our determina-

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tion. It is this: Whether a contract made between attorney and client that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property recovered as full compensation for his services, is void in Missouri, even though there is no agreement that the attorney shall pay costs or furnish any money toward the expenses of the suit, or of the proceedings instituted with a view to the recovery of the property in dispute.

If this contract is void, it is void for champerty. It seems necessary to determine, therefore, what is champerty; and, if this comes within the definition of the offense, then to decide whether a champertous contract is void in this State.

Maintenance is an officious intermeddling in a suit that noway belongs to one, by assisting either party with money, or otherwise, to prosecute or defend. It is said to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression.

Coke makes champerty a subdivision of maintenance, and says it is "to maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit, and then is called *cambipartia*" (*cambipartitio*), "or maintenance." Co. Lit. 368, *b*.

Hawkins follows Coke (Hawk. P. C.), and, if this definition is to be accepted as exact, there can be no question that the contract before us is champertous.

But the definition of Coke is not followed by later writers. "Champerty," says Blackstone, "is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." This definition is adopted by Chitty. Con. 676. The law dictionaries, Tomlin's, Jacob's, Wharton, and Bouvier, all make the carrying on the suit at the expense of the cham-

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pertor of the essence of the offense. And the first English statute on the subject (33 Edw. I.) defines champertors as those who move pleas or suits, or cause them to be moved, either by their own procurement or by others, and sue them at their proper costs, to have part of the land in variance, or part of the gain.

If these latter definitions are accurate, the contract sued on is not champertous, and plaintiffs could maintain their suit.

Little help in arriving at an accurate definition of the offense is to be had from the decided cases, as the decisions are conflicting.

Champerty was an offense at common law, and also by various statutes, in the reign of Edward I., Edward III., and Henry VIII. The weight of authority would seem to be in favor of the view that the offense is complete, if the contract be to receive a part of the thing to be recovered, only when the contracting party is to aid the suitor by paying costs and expenses of the suit. But, in view of the great authority of the definition of the offense by Coke, it cannot be positively determined that a contract is clearly not champertous merely because the attorney does not agree to pay the costs.

The question next to be determined is, whether a champertous contract be void in Missouri.

By the act of January 19, 1816, the Spanish law was abolished in Missouri, and the common law of England adopted in its place. That statute provides that "the common law of England, and all statutes and acts of Parliament made prior to the fourth year of James I., and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to, or inconsistent with, the Constitution of the United States, or the statute law in force for the time being, shall be the rule of action and decision in this State, any law, custom, or usage to the contrary notwithstanding. 2 Wag. Stat. 866, sec. 1.

Now, there can be no question that, in the fourth year of

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James I., champerty was a criminal offense in England, and that then, and until a very recent period, at least, a champertous contract was held, and would probably now be held, to be void in that country; but it is also true that, at the same period, and even down to our own days, wager of battel and wager of law were methods of trial upon which the defendant in a writ of right, and in some other forms of action, might insist in England. It is not pretended that they were introduced into Missouri with the common law, and we must determine whether the statute just recited makes the English law as to champerty of effect in this State.

By adopting as well the common law as such English laws as are of general nature, not local to that kingdom, the people of this State recognized and adopted, as one entire system, so far as applicable to our situation and government, a vast and comprehensive body of laws, consisting of infinite particulars applicable to a great empire, and which wisdom and prudence, both legislative and judicial, are constantly modifying and adapting to our varying circumstances.

Because champerty was a highly penal offense, both at common law and by statute, in the reign of James I., we do not think that it conclusively follows that champerty is an offense in Missouri to-day. The evil of buying of titles and pretended rights of persons not in possession, alleged as the mischief provided against by the laws against champerty, could hardly be considered a mischief or wrong in an unsettled country, where few owners would be likely to occupy even the premises they actually had, or might readily acquire.

The generic offense of maintenance, of which champerty is a species, rests mainly on a series of statutes ending with 32 Henry VIII. It was, however, also punishable by fine and imprisonment at common law, and subjected the offender to a suit for damages.

The reasons for the ancient doctrine on the subject are

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admitted even now, in England, to have mainly ceased, and the courts treat the old learning on the subject with great disfavor. In *Masters* v. *Miller*, 4 T. & R. 320, Butler, J., says: "It is curious, and not altogether useless, to see how the doctrine of maintenance has, from time to time, been received at Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpœna or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside must be expected. Accordingly, a variety of exceptions were soon made."

The rule of common law which prohibited the assignment of a cause in action was a breach of the law of maintenance. Coke expressly says so, and lays down the reasons as identical with those against champerty. Co. Lit. 114, *a*. But this was long ago so explained away as to remain, at most, only an objection to the form of action; and in this State the technical rule of the common law is utterly swept away, in this regard, in a manner which manifests that hostility to the principles of the law of champerty and maintenance which is so general in our sister States.

In 1798 a statute was enacted in New York against maintenance. In 1830 the revisors, in their report to the Legislature, say: "It is proposed to abolish the law of maintenance and to qualify that of champerty." Accordingly, the old law of maintenance was included in the general repealing act, and Chancellor Walworth speaks of the "absurd doctrines of maintenance that grew out of the necessities of a semi-barbarous age being swept away in the general revision, having been virtually abrogated long before that time."

It was long ago held in Pennsylvania (*Stoever* v. *Whit-*

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man, 6 Binn. 416), Chief Justice Tilghman delivering the opinion of the court, in 1814, that it is no objection to a conveyance of land that the grantor is out of possession. "It may be affirmed with certainty," says that learned judge, "that the law on that subject, as held there in England, was never adopted. From the equality of conditions of persons in this country, there was no danger of maintenance from the interference of powerful individuals."

It has been recently held in Wisconsin that an agreement between attorney and client that the attorney shall be paid by receiving part of the land recovered is not void in that State (*Allard* v. *Lamirande*, 29 Wis. 502); and the court very truly says that the old common-law rules as to champerty have been necessarily qualified or restricted by judicial decisions, or otherwise; that agreements for a fee contingent on success are neither immoral, disreputable, nor illegal; and that a contract that the attorney shall receive a certain percentage, measured on the amount recovered, which is undoubtedly good, cannot be on principle distinguished from an agreement to receive a percentage from the amount recovered itself, which has been held to be champertous and void. The court holds, however, that, under the authorities, the contract before it would have been bad had the attorneys agreed to pay the expense of the action.

In Georgia it is held that 32 Henry VIII., ch. 9, is not law in that State. *Cain* v. *Monroe*, 23 Ga. 82.

In California it is held that champerty is not an offense; and champerty will not avoid a contract. *Matthewson* v. *Fitch*, 22 Cal. 86. This decision has been recently affirmed.

In Massachusetts the old doctrine is adhered to, but not with favor. 5 Pick. 548.

In New Hampshire and Iowa (5 N. H. 181; 3 Iowa, 482) champerty does not avoid a contract; the offense is unknown.

In Connecticut it is declared that the reasons which made a law against champerty and maintenance salutary or neces-

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sary in England do not exist here—certainly not to the same extent. *Richardson* v. *Rowland*, 40 Conn. 563 (1873).

Vermont, Delaware, and Tennessee discard the rule. *Danforth* v. *Streeter*, 28 Vt. 490; *Bayard* v. *McLane*, 3 Harr. (Del.) 139; *Sherley* v. *Riggs*, 11 Humph. 53.

In Texas it is declared that the laws against champerty are not to be regarded as part of the common law in that State. The court says that the laws adapted to a kingdom, with a strong landed aristocracy, are wholly unfitted for a country where we have lands for the millions; and adds that, if a lawyer helps his client to recover lands from the possession of another, and takes part of the land for his fee, it is no breach of the ethics of the profession, or of the moral law. *Bentinck* v. *Franklin*, 38 Tex. 458 (1873).

In Virginia it is said that the question of champerty, or a savor of champerty, is wholly out of the way in discussing the validity of a contract. *Major* v. *Gibson*, 1 Patt. & H. 84.

Chief Justice Parker, in giving the opinion of the court in *Thurston* v. *Percival*, 1 Peck, says that "it sometimes is useful and convenient, where one has a just demand which he is not able, from poverty, to enforce, that a more fortunate friend should assist him, and wait for his compensation until the suit is determined, and be paid out of the fruits of it." And Mr. Justice Grier, in giving the opinion of the Supreme Court of the United States in *Roberts* v. *Cooper*, 20 How. 467, says that the ancient English doctrines respecting champerty and maintenance have not found favor in the United States, and that the enforcement of the law here would not always, perhaps not generally, promote justice.

No such contract has been declared void in our State, and we see no necessity for introducing the doctrine now. The state of society amongst us does not require it. The tendency of legislation and of judicial decisions is, we think, against it. Clients may be safely left to the protection of

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the courts, who will relieve against extortion or unfair dealing should a proper case arise. Public policy requires no other protection. Analogies from the Roman law, which regarded compensation to the advocate as a mere *honorarium* or gratuity, or from the old common law, which regarded it in a similar light, are out of place in a practical age. According to English law, the physician can recover a fee, the surgeon cannot; the attorney is legally entitled to compensation, but the barrister's services must be paid in advance, because they are a mere gratuity. With us, the laborer is worthy of his hire, and the universal practice, and the rule of law, places the lawyer, the doctor, the preacher, and the school-master on the same footing of common right as to the recovery of compensation.

The whole doctrine of maintenance and champerty is a relic of a state of things long since passed away. During the Crusades, when land-holders were absent from home, dishonest men, who had iniquitously asserted claims to the land of absent owners, frequently, on the return of the proprietor, assigned their pretended claims to some powerful neighbor, that by the weight and influence of his name the right cause might be faced down; and it was to put an end to such wrongs that the statutes against maintenance and champerty were framed, in affirmance of the common law. But there is no such mischief to be apprehended in our days, and the reason of the law would seem to have ceased. Contracts illegal at common law, as being contrary to public policy, are such as injuriously affect or subvert the public interest. *Ex turpi contractu actio non oritur.* But we see nothing contrary to the welfare of society and the administration of justice in upholding a contract between attorney and client that the attorney shall be paid out of the thing recovered. On the contrary, many a poor man with a just claim would find himself unable to prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of the suit. Such contracts have been

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of constant occurrence throughout this State, and, if they are immoral or illegal, there are perhaps few attorneys in active practice amongst us who have not been habitual violators of the law.

The Supreme Court of Illinois has recently decided a champertous contract void. It is true that the contract considered by the court in that case (*Thompson* v. *Reynolds*) differed from the one at bar, in that it provided that all expenses of litigation should be borne by the attorneys, and it was therefore champertous, according to Blackstone's definition, while the contract before us was not. But the views expressed in Illinois are irreconcilable with those upon which this opinion is based. The same may be said of the case of *Scobey* v. *Ross*, 13 Ind. 117, and of other decisions in Kentucky and elsewhere. It is because of the conflict of authority on the subject that we have gone somewhat more at length into the question than was perhaps necessary, though no more so than the importance of the principles involved seems to demand.

We are of opinion that the Circuit Court erred in sustaining the demurrer to the petition of plaintiff, and the judgment of the Circuit Court is reversed and the cause remanded, to be proceeded with in accordance with this opinion. The other judges concur.

AUGUST KOEHLER, Respondent, *v.* MAX FEUERBACHER *et al.*, Appellants.

April 10, 1876.

An agreement between two keepers of places of public entertainment not to pay a bonus to any club or society, for twelve months ensuing the date of the agreement, as an inducement for the selection of any of the parks kept by the respective parties to the agreement, for festivities, is not void as against public policy.

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APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Finkelnburg & Rassieur, for appellants, cited: India Association *v.* Rock, 14 La. An. 168; Stanton *v.* Allen, 5 Denio, 435; Crawford *v.* Wick, 18 Ohio St. 203; Hilton *v.* Eckersby, 6 El. & Bl. 47–66; Horner *v.* Graves, 7 Bing. 743; Alger *v.* Thatcher, 17 Pick. 51.

Gottschalk, for respondent.

BAKEWELL, J., delivered the opinion of the court.

The petition in this case is as follows: "Plaintiff states that before and on February 13, 1873, this plaintiff, one John H. Schmidt, and the defendant Strube were each the keeper of a place of public resort for amusement, known respectively as the Union Park, the Concordia Park, and the Lindell Park, from the keeping of which places they derived a liberal income, and which constituted their business; that on said day they entered into a certain agreement, herewith filed and made part hereof, marked 'Exhibit A,' whereby they bound themselves each to the other, for the twelve months then next ensuing, among other things, not to grant, pay over to the benefit of any society, club, lodge, military or other company, nor to their officers, nor to any person, directly or indirectly, as an inducement or consideration for the selection of any of the said parks for festivities, any money or bonus, nor pay for any music band employed by such societies, and, in case of violation, they fixed the sum of $500 as the liquidated damages accruing to each one of the other parties to said agreement; and, to secure the payment of said sum of $500 to this plaintiff, in case of his, the said defendant, violating the agreement aforesaid, the said defendant Strube, as principal, and said Max Feuerbacher and Louis Schlosstein, copartners under the name of Feuerbacher & Schlosstein, as his securities, made, executed, and delivered to this plaintiff their certain writing obligatory, under their hands and seals, dated on said February 13, 1873, and herewith filed, marked

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'Exhibit B,' whereby they bound themselves to pay to this plaintiff the sum of $500 if said Strube should break the condition of said bond, which is as follows:

"'Now, if the above-bounden Louis H. Strube, during the duration of said agreement above specified, shall truly and faithfully comply with the terms and stipulations of said agreement, then this bond shall be void; otherwise, to remain in full force and effect.'

"And this plaintiff further says that said Louis H. Strube committed the following breaches of the conditions of said bond—that is to say: He did not truly and faithfully comply with the terms and stipulations of said agreement, but, on the contrary, he did, during the year from February 13, 1873, to February 13, 1874, grant, contribute, and pay over to the benefit of a society, to wit, 'The Druids,' and to its officers, as an inducement or consideration for the selection of said 'Lindell Park' for its festivity, money and bonus, to wit, the sum of $500, and did also, during the same year, pay for music bands employed by such societies, contrary to the terms of said agreement; that this plaintiff, during said year, was the keeper of said 'Union Park,' and by the breaches of said bond, by the said defendant Louis H. Strube, was damaged and injured in a large amount, to wit, $1,000."

The petition further alleges that, by reason of the breaches assigned, the obligation of the defendants became absolute, and they thus became, and are, indebted to the plaintiffs in the sum of $500, for which, with costs, he asks judgment.

To this petition defendants Feuerbacher & Schlosstein demurred, on the ground that it does not set forth facts sufficient to constitute a cause of action. This demurrer coming on to be heard, plaintiff dismissed as to defendant Strube. The court sustained the demurrer, and, plaintiff refusing to plead further, judgment was entered in favor of defendants. From this judgment plaintiff appealed to general term, where the judgment of special term was

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reversed and the cause remanded. From this judgment defendants Feuerbacher & Schlosstein appeal to this court.

We see nothing contrary to public policy in the contract set out in the petition, and think it is clearly one which the court must enforce.

What constitutes public policy is not, perhaps, exactly determinable; it is indefinite in its nature, changing with the habits, wants, and opinions of society. Forestalling, regrating, and engrossing were prohibited by statute in England 300 years ago, and were considered to be against policy so late as the time of Blackstone. They are now the great basis of profits; are not only practiced every day, but are recognized as the very life of trade, and without them it may be said that commerce, as known amongst us, would be at an end. To buy merchandise on its way to market, to buy provisions in any market and sell them again in the same market, or within four miles of the place, or to buy up provisions in large quantities for the purpose of selling again, were statutory offenses in England in the middle of the last century, and were recognized as offenses at common law long after the repeal of the statute. It is quite safe to consider that they would not now be held to be against public policy.

Contracts in total restraint of trade, or of marriage, against the prohibitions of statutes, to infringe a copyright, to defraud the government or third parties, to oppress third parties or prevent the due course of justice, or induce a violation of public duty, that tend to encourage unlawful or immoral acts, or that are founded on trading with an enemy, are all against public policy, and void. And, probably, this is a complete enumeration of the several classes to which contracts against public policy may be reduced. Undoubtedly the courts will give no countenance to an action founded on a contract which comes fairly under any one of these heads. But we utterly fail to see that the contract set forth in the petition can be brought under any one of them. It is urged

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that it is a combination against the public to keep up prices; but it seems very clear that it is nothing of the kind. A custom of offering a bonus to certain organizations to hold festivals in this private park, or in that, must, one would think, have a tendency to enhance the price of admission to the entertainment. An agreement to be no longer a party to such a system of unfair competition strikes us as being eminently in the interest of good morals, fair and free trade, and honest rivalry in business. If dry-goods houses in a certain town should agree to employ no drummers for trade, or hotel-keepers to employ no runners, the contract would be much of the same character, and we see nothing illegal about it.

We see no force whatever in the objections urged by appellants to this contract as set out, and think the demurrer should have been overruled. The judgment of the general term of the Circuit Court, reversing the judgment of the special term, is affirmed and the cause remanded. The other judges concur.

JOHN WEBER, Respondent, v. JOHN EBLING, Appellant. 2 15 / 99 *431

April 10, 1876.

1. Ebling and Able are not *idem sonans*, and it is error to admit evidence of a judgment against John Able in a proceeding to revive a judgment against John Ebling.
2. A judgment cannot be revived against E. by showing that judgment was rendered against him under the name of A.; but, if he has knowingly allowed judgment to be rendered against him by the name of A., an execution on that judgment can be made effectual against any property he may have subject to execution.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Gottschalk, for appellant.

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Francis Garvey, for respondent, cited: Stone *v.* Powell, 5 Mo. 435; Wag. Stat. 831, sec. 10.

BAKEWELL, J., delivered the opinion of the court.

This was a proceeding to revive a judgment rendered on October 8, 1863, before a justice of the peace.

On the trial plaintiff was allowed, against the objection of defendant, to introduce in evidence the docket of the justice showing a judgment against John Able, and also to introduce evidence tending to prove that the John Ebling, defendant in the present proceeding, and the John Able, against whom the original judgment had been obtained, are the same man.

There was a verdict and judgment for plaintiff, and the cause is brought here by appeal.

Beyond all controversy, the names, John Ebling and John Able, are not *idem sonans;* and it is difficult to see how entering a judgment against John Ebling can be the revival of a judgment against John Able. The statute authorizes the justice, in this proceeding, to make an entry reviving the judgment already upon his docket; it gives him no power to change the original judgment or to correct any mistake as to name or amount. If the original judgment was against John Able, the judgment must be revived against John Able, and cannot be revived against John Smith by showing that judgment was got against Smith by the name of Able. There is no hardship in this.

It is too late now to correct a mistake in the original judgment; but that judgment, on proper notice to the defendant and compliance with the statute, can be revived as it stands. If, in fact, the defendant has gone by the name of Able, or has knowingly allowed judgment to be rendered against him by that name, an execution on that judgment can be made effectual against any property subject to execution that he may have.

If the name Ebling cannot be thus connected with the person of defendant, plaintiff may, perhaps, have

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another remedy. Be that as it may, the courts cannot, in a proceeding to revive a judgment, relieve against the consequences of a mistake of name in the judgment itself.

The Circuit Court erred in admitting evidence of a judgment against John Ebling, in a proceeding to revive a judgment against John Able. The judgment must be reversed and the cause remanded. The other judges concur.

MARY E. DWYER, Respondent, v. WILLIAM DWYER, Appellant.

April 10, 1876.

By THE COURT.—1. It is not competent, in a divorce suit, to show the general reputation of the husband or wife for good temper, or the reverse.

2. Where the ground of divorce is that the defendant offered such indignities to plaintiff as to render her condition intolerable, and the evidence shows harsh language and refusal to speak, continued for several weeks, this court will not interfere with the action of the trial court in refusing to grant a divorce.

By JUDGE BAKEWELL.—In proceedings for divorce it is not competent for the husband or wife to testify to private conversations held between themselves.

APPEAL from St. Louis Circuit Court.

General term reversed; special term affirmed.

Hitchcock, Lubke & Player, for appellant, cited: Wag. Stat. 1374, sec. 5; Moore v. Moore, 51 Mo. 118; Buck v. Ashbrook, 51 Mo. 539; Berlin v. Berlin, 52 Mo. 151; Hooper v. Hooper, 19 Mo. 355; Gillinwater v. Gillinwater, 28 Mo. 60; Messenger v. Messenger, 56 Mo. 335.

A. J. P. Garesché and *W. F. Rogers*, for respondent, cited: Bishop on Mar. & Div. (5th ed.) secs. 624, 644; 1 Greenl. on Ev., secs. 343, 344; Moore v. Moore, 51 Mo. 119; Berlin v. Berlin, 52 Mo. 152; Elmes v. Elmes, 9 Barr. 167; Lewis v. Lewis, 5 Mo. 278, 279; Cheatham v. Cheatham, 10 Mo. 298; Hooper v. Hooper, 19 Mo.

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357; Kempff *v.* Kempff, 34 Mo. 212; Koffman *v.* Koffman, 43 Mo. 550; Greenl. on Ev., secs. 54, 55; O'Bryan *v.* O'Bryan, 13 Mo. 16; Wag. Stat. 1068, sec. 32; State *v.* Rogers, 36 Mo. 138.

BAKEWELL, J., delivered the opinion of the court.

This is a proceeding for divorce, commenced by the wife against the husband, under our statute. The ground alleged is that the defendant offered such indignities to plaintiff as to render her condition intolerable. The Circuit Court, at special term, on hearing, refused the decree; on appeal to general term this judgment was reversed and the cause remanded. From this judgment of general term an appeal is taken to this court.

The testimony in the case is mainly that of the husband and wife—who contradict each other. Other witnesses were called, but their testimony is unimportant. If the testimony of the wife as to private conversations between herself and her husband be excluded, there is not evidence on which to base a decree.

The court, on the hearing of the cause, admitted conversations held by the husband and wife in bed, in regard to which it is sufficient to say that it is difficult to see what stress of circumstances could justify their repetition anywhere, or induce a woman, so respectable as the plaintiff undoubtedly is, to so much as allude to them in the presence of third persons. The court also admitted, generally, all conversations held by the husband and wife when alone—to all which conversations and statements defendant objected. Plaintiff offered to prove that the character of defendant was that of a violent man, and her own character that of a submissive and amiable woman, and the court, at the objection of defendant, rejected all such evidence. Exceptions to these rulings were properly saved.

Had the cause been tried before me, and had all the testimony admitted been competent, I should have felt compelled to dismiss the bill. I do not think that it is the policy

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of our law to annul the contract of marriage except for very grave reasons, proved to the entire satisfaction of the court. It is not that I do not think—taking the statements of the plaintiff to be true—such indignities were offered to her as to render her life intolerable within the meaning of the statute. On the contrary, I think that refusing to allow her to control the household in subordination to her husband, as is the custom of matrons; refusing to speak to her, or to serve her at table; reducing her to a menial condition, and treating her as a servant rather than as a helpmate and a wife—to say nothing of outrages in matters pertaining to the most intimate relations of husband and wife—that all these things together, and each of them in particular, as detailed in evidence of the plaintiff, constitute intolerable indignities within the meaning of the law. But the statements of the wife as to all these grievous offenses are contradicted by the husband, and the testimony left after the conflicting statements are contrasted is not sufficient to warrant a decree. It is, however, urged by counsel for plaintiff that they should have been allowed to show the amiable character of the wife and the overbearing temper of the husband, by proof of their general reputation in these respects. But this was clearly incompetent. No attempt was made directly to impeach the defendant, and to attack his statements by showing the character of the parties for good temper, or reverse, and the consequent intrinsic probability that he did use the rough language imputed to him by his wife, is what could not be allowed.

As to rough language, the plaintiff, a woman apparently of gentle manners, who before her marriage had been a housekeeper in quiet families, seems to have been quite sensitive to coarseness of speech; and the language of her husband was, clearly, occasionally profane. He had been a river man, and used to an idiom rather energetic than elegant. His habitual language to his wife, or in her presence, was perhaps such as must be shocking to a woman quiet in

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her ways and religiously disposed; and Mrs. Dwyer appeared to call this cursing her. But Dwyer says he never cursed her, and it is quite likely he thinks he never did; and, without imputing conscious falsehood to his wife, it is quite probable, in spite of her statements, that he never did; and, if he did, Mrs. Dwyer ought to have been ready to put up with a rough and hasty word, if that were all. In her state of life, and in his, people generally have the sound sense to care more for actions than for words.

But I think that all the conversations between the husband and wife, held in private between themselves, were incompetent, and should have been kept out. This would exclude from divorce suits all these disgusting revelations of the secrets of the marriage bed. It is the policy of the law that communications between husband and wife are privileged. At common law, the wife can testify against the husband in case of a criminal assault committed or threatened against her person, by her husband, but beyond this she cannot go; and the statute expressly prohibits any married woman from testifying to admissions or conversations of her husband. Wag. Stat. 1374, sec. 5. In *Moore* v. *Moore*, 51. Mo. 118, the court holds husband and wife competent witnesses against each other in a divorce suit, but not as to communications made by one to the other; and so, in *Buck* v. *Ashbrook*, 51 Mo. 539, the wife is held incompetent as to a private conversation with her husband. Such a rule may work hardships in individual cases, but great and general public demoralization and misery, and the destruction of confidence between husband and wife, must result from the contrary rule. I am quite confident that what is good in our civilization will speedily disappear if the sanctities of home and of the marriage relation are not upheld by the law; and I believe it to be against public policy to give to statutes, in derogation of the common law in regard to the rights and duties of husband and wife, any wider scope of interpretation than the plain letter of the

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law demands. Undoubtedly, great misery often results from ill-assorted marriages; but much greater and wider-spread misery, and the total disorganization of society, will be the result of dissolving the marriage bond for incompatibility of temper and harshness of speech.

It was urged in the argument that, amongst other outrages of the husband, he had, in his answer, denied all knowledge or information, sufficient to form a belief, of an allegation in the petition that the plaintiff was pregnant of a lawfully-begotten child. I find, however, that the petition does not allege this, and the answer does not deny it. The petition says that, "as a result of said marital relations, she is in a delicate condition," and the answer denies knowledge of any such state of facts. But, if the pleader meant that plaintiff was pregnant, he should have plainly said so. "Pregnant" is a good English word that clearly expresses the idea, and, whenever it is proper to express that idea, no exception can be taken to its use. A woman may be in a delicate condition without being with child; the two things are by no means synonymous. As a matter of taste, we may think plain English the best, when such things are talked about; in the matter of pleading, however, it is necessary to be so plain that there can be no room for mistake.

This, perhaps, is one of many misapprehensions which have culminated in this alienation between two persons, doubtless useful members of society, and respected and esteemed by their associates, and who, but a few months ago, entertained for one another a sincere mutual affection and respect. As no offense against the principal duty and obligation of marriage has been committed on either side, it is, perhaps, not yet too late to suggest that there are some misfortunes which are rendered tolerable only by endurance, from which courts of justice can grant no adequate relief, and which legal advisers, so indispensable in many affairs

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of life, may, though prudent, learned, and faithful, only aggravate.

But, for the reasons given, I think the judgment of general term, reversing the judgment of special term, should be reversed, and that the judgment of the special term of the Circuit Court should be affirmed. The other judges concur in reversing the judgment of general term, but do not concur in the views expressed as to the competency of the evidence.

SAMUEL STILWELL *et al.*, Respondents, *v.* COMMERCIAL INSURANCE COMPANY, Appellant.

April 10, 1876.

1. Freight is insurable and recoverable while the goods are so situated as to create a well-grounded expectation of freight.
2. Where a marine insurance is "against a total loss of any part of said boat or barge's freight, at and from St. Louis to New Orleans," the policy covers freight contracted for and to be shipped on the way, as well as that on board when the vessel leaves port.
3. Where the insurance was against total loss of freight of a boat and barge, and the barge was lost and her cargo transferred to the boat, and freight earned upon it, *held*, that this fact did not prevent a recovery for the loss of freight which would have been earned but for the destruction of the barge.
4. Where some of the plaintiffs became bankrupt after the commencement of the suit, and before judgment, the fact that the assignee was not made a party is no ground for reversing the judgment.

APPEAL from St. Louis Circuit Court.

Affirmed.

Samuel N. Holliday, for appellant, cited: Amis *v.* Steamboat Louisa, 9 Mo. 621; Gleim *v.* Steamer Belmont, 11 Mo. 112; Clark *v.* United Ins. Co., 7 Mass. 365; Williard *v.* Millers', etc., Ins. Co., 24 Mo. 561; Buchanan *v.* Ocean Ins. Co., 6 Cow. 318; Ridyard *v.* Phillips, 4 Blatchf.

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443; Lord *v.* Neptune Ins. Co., 10 Gray, 109; Davy *v.* Hallett, 3 Caine, 16; Forbes *v.* Aspinwall, 13 East, 327; Watson *et al.* *v.* Ins. Co. of South America, 3 Wash. 1; McGaw *v.* Ocean Ins. Co., 23 Pick. 405; 2 Ph. on Ins. 20–21; 2 Pars. Mar. Law, 69.

Rankin & Hayden, for respondents, cited: Thewing *v.* Ins. Co., 10 Gray, 457; Lord *v.* Neptune Ins. Co., 10 Gray, 113; American Ins. Co. *v.* Curtis, 4 Wend. 45; 15 Mass. 324; Tenscolt *v.* Christie, 2 Brod. & B. 320; Davidson *v.* Willasey, 1 M. & S. 321; Warre *v.* Miller, 7 D. & R.; *s. c.*, 4 B. & C. 538; Devaux *v.* J'Anson, 7 Scott, 507; *In re* Clark, 3 B. R. 123; Samson *v.* Barton, 4 B. R. 1; Foster *v.* Hackley, 2 B. R. 131; Manson *v.* Horrick, 100 Mass. 323.

BAKEWELL, J., delivered the opinion of the court.

This was action to recover $2,000, and interest, on a policy of insurance upon freight of steamer "Commonwealth" and barge "W. B. Dance," against total loss of any part of said steamer's or barge's freight, at and from St. Louis, Mo., to New Orleans, La., in December, 1871.

The petition alleges that plaintiffs were owners of the steamboat "Commonwealth," and charterers of the barge "Dance;" that plaintiffs, Samuel and Enoch Stilwell and Daniel R. Powell, were partners, and as partners, and on account of the owners, they, on December 19, 1871, made a contract of insurance with defendant, according to the terms of the contract set out in full below; that, at the time this insurance was made, the boat and barge were about to start on a voyage from St. Louis to New Orleans and intermediate points; that the steamboat and barge had each a partial cargo on board, and the rest of their cargoes, to the full extent of their carrying capacities, contracted and agreed for; that the freight on that part of said barge's cargo loaded at St. Louis was $2,298.22 in value; that the freight on all of said barge's cargo was over $4,000; that said boat and barge left St. Louis on or about Decem-

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ber 19, 1871; that, on December 20th, and while navigating the Mississippi river on said voyage, said barge met with an accident of navigation, by which she was sunk so that she could not be raised, but became a total loss; that by said accident the voyage was, so far as the barge was concerned, broken up; that, owing to a peril insured against, the barge did not and could not earn any freight, and that the whole amount of the barge's freight, which was the property of the plaintiffs, was totally lost to them, by which they suffered a loss of over $4,000.

The answer denied nearly all the allegations of the petition except that the contract of insurance was made as stated by the plaintiffs. The defendant set up, however, that the barge was chartered by the owners of the steamboat "Commonwealth," and was by her towed to Cairo, with a possibility of taking the barge to New Orleans; and claimed that the policy did not cover any specified amount on either said boat or barge, but covered $2,000 of freight on both the boat and barge, and that, whether the freight was all on the boat or all on the barge, or partly on each, it was equally covered by the policy; alleged that the cargo of the barge was on deck, and was saved and transferred to the boat, and by the boat conveyed to its destination, and that the freight thereon was earned by the boat and barge, and was collected by the owners of the boat. The defendant further alleged that the freights on the boat and barge were insured in the Home Insurance Company, and that the plaintiffs were endeavoring to collect double insurance.

The reply denied the allegations in the nature of new matter contained in the answer, and alleged that both boat and barge started on the voyage to New Orleans, and at the time of the accident were bound thither; admitted that a part of the barge's cargo was, on the sinking of the barge, transferred to the boat, and by it carried to New Orleans, but denied that the freight on such cargo was earned by the boat and barge, or collected by the owners of the boat;

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admitted that there was a policy on the same freights in the Home Insurance Company, to the amount of $1,000, but denied that there was any double insurance. The policy is in the form common in cases of insurance on freight, and reads as follows:

"*St. Louis, December 19, 1871.*

"*To Commercial Insurance Company, of St. Louis:*

"Insurance is wanted by Stilwell, Powell & Co., for account of owners of steamer 'Commonwealth,' loss, if any, payable to assured, upon freight of steamer 'Commonwealth' and barge 'W. B. Dance,' against the total loss of any part of said steamer's or barge's freight, at and from St. Louis, Mo., to New Orleans, La., by the dangers of navigation or fire, with the privilege of lightering, towing, and reshipping, in the sum of $2,000; rate, 1-4 per cent., $25.00."

The application was signed for the plaintiffs, and across the face of it is the printed word "accepted," and this acceptance is signed, "John B. McDowell, jr., sec'y."

The evidence showed that, when the above insurance was taken out, the "Commonwealth" and the barge "Dance" were at St. Louis partially loaded, and about to start to New Orleans; that the river was very low, and that the barge "Dance," which had been a steamboat, and was of large carrying capacity, was taken by the master, to enable him to comply with numerous engagements he had made for freights; that, on December 20, 1871, when the boat and the barge left St. Louis, the boat had from 100 to 150 tons of cargo, the freight on which amounted to $1,054.71, and that the barge had from 225 to 250 tons on board, the freight on which amounted to $2,298.22; that the boat had capacity for about 100 tons of cargo more than what she had on board, and that the barge had capacity for about 350 tons in addition to her cargo shipped at St. Louis; and that, in arranging for cargo to be taken on at way points between St. Louis and Cairo, calculations

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were made by the agents at St. Louis with regard to the above facts, and to the additional fact that, as the barge drew much less water than the boat, the principal part of the engaged freights would have to be taken on her, and not on the boat. As usual in times of low water, freights were very plenty, and shippers at points between St. Louis and Cairo, anxious to get their goods to market, were making contracts at St. Louis, by which they secured transportation beforehand. Thus, while the boat and barge were "up" for New Orleans, shippers below contracted with the agents of the boat and barge at St. Louis, and the master had agreed with them, before he left St. Louis, to take on that trip, at Kaskaskia, 1,200 barrels of flour; at Rockport, 300 barrels; at Willard's, from 800 to 1,000 sacks of corn, and, at Cape Girardeau, between 1,400 and 1,600 barrels of flour, at rates which were fixed, on 'Change at St. Louis, between the agents of the owners and these shippers or their agents. The engaged freight, according to the rates thus fixed, amounted to about $4,500. In making these contracts for goods thus to be taken at points below St. Louis, the master states that specific engagements were made for the barge, and specific engagements for the boat. Thus, from 350 to 400 tons were engaged especially for the barge, the master calculating that she could, in view of her capacity, carry that amount in addition, at the then stage of the water.

On December 20th the boat and barge left St. Louis for New Orleans. When near Ste. Genevieve Island the barge met with an accident of navigation, and sunk in such a manner that it could not be saved nor repaired. No other boat or barge could be procured to take its place, and, in consequence of this, the master was forced to put the barge's cargo—that is, the cargo the barge had on her when she left St. Louis—on board of the steamboat "Commonwealth." For this cargo so received by her, the boat gave to the barge a bill of lading, which was read in evidence, the boat

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agreeing to transport the barge's cargo from the place of disaster to its destination, at the same rate of freight at which this cargo was to have been transported from St. Louis. This was the usual rate; the testimony showing that rates of freight from points between St. Louis and Cairo to Vicksburg and New Orleans were the same as from St. Louis to Vicksburg and New Orleans. The "Commonwealth" then started down the river, but, being overloaded by having the barge's cargo aboard, she was forced to wait two weeks for water. The river rising, she went on her way. Owing to the accident to the barge, all the freight-money on merchandise engaged to be taken, both by boat and barge, at way points between St. Louis and Cairo, to the amount of about $4,500, was lost, with the exception of the freight on about fifty tons of flour, which the boat was forced to take, because the shippers who had contracted with the master for its carriage had left it exposed on the bank of the river. The testimony of the master shows that, if it had not been for the accident to the barge, he could have taken all the engaged merchandise through to New Orleans without trouble. The "Commonwealth" arrived at New Orleans, and there delivered her cargo, as well as the merchandise she had agreed to deliver for the barge, and collected freight for all the merchandise which she delivered. Upon notice being given to the defendant of the loss, it denied it was liable, in any amount, under the policy. The evidence showed that there was, besides the present insurance, $1,000 on the same subject-matter in the Home Insurance Company, and $1,000 in the North Missouri Insurance Company.

We have, for the purposes of this opinion, adopted the statement of plaintiffs' counsel, which is perspicuous and accurate. To that statement it is proper to add that the defendant, on the trial, objected to all evidence as to freights engaged between St. Louis and Cairo for the boat or barge.

One of plaintiffs' witnesses, Carroll, a steamboat agent,

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testified that he engaged the freight for the boat and barge between St. Louis and Cairo, and did not recollect whether he spoke of the barge when he engaged freight. He said it was unusual to speak of the barge in such cases.

Sedam, one of the plaintiffs, swore that specific engagements were made for the barge and specific for the boat, and that he attended to it.

Captain Spoods testifies that it is customary to make engagements for freight for the boat and barge together, as that gives the privilege of carrying on the boat or barge; and that, nine-tenths of the time, the shipper does not know of any barge till the bill of lading is signed.

The notice of proof of loss was introduced by plaintiffs, in which they only claim $1,149.12.

The defendant introduced no evidence.

At the close of the plaintiffs' case the defendant asked these instructions, which were all refused by the court, the defendant excepting:

1. "The court declares the law to be that, upon the whole case made by the evidence, the plaintiffs are not entitled to recover."

2. "If the court, sitting as a jury, believe from the evidence that all the cargo shipped on the "Commonwealth" and barge "W. B. Dance," on the voyage in question from the port of St. Louis, was transported and delivered, on said voyage, by the steamer "Commonwealth," then the plaintiffs are not entitled to recover in this action."

3. "The court declares the law to be that the plaintiffs are not entitled to recover in this action for the loss of any freight-money that was to have been received for goods, wares and merchandise, and other property that were to have been obtained by both said boat and barge after leaving the port of St. Louis on her said voyage."

4. "The court declares the law to be that the policies of insurance on the freight list of the steamboat "Commonwealth" and barge "Walter B. Dance" attached to the

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freight list of all the cargo on board of said boat and barge when they left St. Louis on said voyage, and to the amount of the freight list so on board when they left St. Louis, the plaintiffs can in no event recover."

5. "If the court, sitting as a jury, believe from the evidence that the plaintiffs did not have their freight list covered by the policy sued on fully insured, then they can only recover of the insurance companies insuring same that proportion of the loss that the sum insured bears to the whole freight list covered by terms of policy, and can only recover of each insurance company its proportion of such sum so recoverable."

There was a verdict and judgment for plaintiff for the amount of the policy and interest, and, all exceptions having been saved, the cause is brought to this court by appeal.

It seems quite clear that the boat and barge were two bottoms. They were recognized as such, throughout, by both parties to this transaction. The insurance is against a total loss of the freight of the boat, and also of the freight of the barge; when the freight was transferred from the barge to the boat, a bill of lading was given and received, as usual when one vessel takes the cargo of another; and the captain swears that the freight was engaged especially in reference to her, and separate engagements made for the boat; and, though Carroll does not confirm this, he does not contradict it.

There was a total loss of the barge's freight. After the accident the barge certainly could earn no freight. Her freight then was, beyond all contradiction, lost; and it can make no difference in this case whether her cargo was deposited on the river bank, or carried to its destination by her consort, the boat. The cargo may have reached its destination, and freight may have been earned for carrying it; but this freight was not earned by the barge.

Nor can it be said that the freight of the barge was

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earned by the boat, in any sense that will relieve the insurers. It is true that the "Commonwealth" carried to its destination the cargo which was on the "Dance," but by so doing she became incapacitated to take on board the cargo she had engaged; and this not only prevented her from carrying her engaged freight, but, by causing a delay of two weeks, caused her owners heavy loss. More than $4,000 worth of freight was lost by the accident. If there had been no shipwreck of the barge, and her freight had not been transferred to the boat, then her whole carrying capacity could have been devoted to engaged freight, and the steamboat and barge, as one bottom, could have earned nearly $8,000, taking together the freight on the cargo on board and that on the cargo engaged; or, if you consider the vessels as two bottoms, as they really were, the barge lost the freight of the cargo transferred to the boat, $2,298; and the boat, by having to make room for the barge's cargo, lost engaged freight, which she would have otherwise carried, which would have brought the sum up to over $4,000. There was, then, a total loss of some part of the steamer's or barge's freight, and the part so lost exceeded $4,000—the total amount of insurance on the freight list.

The total freight that the boat and barge together would have carried, in the absence of accident, is $7,852. Of this $3,352 was on cargo shipped at St. Louis, and the balance on cargo to be taken up at way points between St. Louis and Cairo. The total insurance on freight was $4,000, of which $2,000 was with defendant. It is contended by defendant that the insurance covered only the freight to be earned on the cargo taken at St. Louis; that there was an insurance of $4,000 on $4,000 of freight, and not $4,000 on $8,000 of freight; that for half the freight plaintiffs were their own insurers, and that defendant is liable only for that part of the loss which the amount it insured bears to the whole property at risk. But no authority is cited

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to support this interpretation of the facts of the case, and we think the argument of counsel as to these points by no means convincing.

The subject of insurance here was the profit to be made by carrying the cargo. This is an interest that cannot be valued like a cargo. A large portion of freight is consumed in expenses. The total value of a freight list on the Mississippi could, perhaps, not be approximately determined. The cargo is at risk only from the time it is shipped, but the freight to be earned by carrying cargo is at risk from the moment the voyage begins. The freight on the goods to be received on the way is as much risked as the freight actually on board; the compensation in either case is not existing, but inchoate. If a boat leaves St. Louis for New Orleans without a cargo, to take her load at points on the way, the freight she expects to receive is insurable. "The inception of freight is breaking ground, but, in the law of insurance, if goods are so situated as to create a well-grounded expectation of freight being earned, freight is insurable and recoverable." *Curling* v. *Long*, 1 B. & P. 634. "In almost all cases on this subject," said Baron Park, "the ship was lost before anything was on board." In the case at bar, the cargo was contracted for on terms by which the boat and barge, but for accidents, must have earned nearly $8,000 of freight, and more than half of this they lost by becoming incapacitated to carry it, being the total loss of a part of the freight against which they insured. The insurance was not on a cargo "at and from St. Louis to New Orleans," but on freight to be carried by these vessels on a trip between those points. The idea that the insurance attached "at St. Louis," and could not attach as to any part of the cargo received on the way, is founded upon a confusion of this insurance upon freights with an insurance upon cargo, and the authority cited by defendant's counsel, to the point that this policy could cover nothing but

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freight on the cargo actually on board when the vessels left port, is not applicable to this case.

It is admitted by counsel for defendant that, in cases of insurance of freight, a sum is insurable larger than could possibly be realized by the safe arrival of the vessel at her destined port; so that there is no difficulty on the evidence as to insurable interest.

The policy was not a valued policy, but was for "a total loss of any part of the freight;" and the present loss was a total one.

We are of opinion, therefore, that no error was committed by the Circuit Court in refusing the second, third, and fourth of instructions asked for the defendant; that there was no error in refusing instruction No. 1; and that no error to warrant a reversal appears on the record.

It is urged by defendant that, inasmuch as it appears by the record that three of the parties are bankrupt, they cannot maintain this action. The evidence shows that, at the date of the policy and of the loss, plaintiffs owned the boat and chartered the barge, and were the persons insured. After the commencement of this suit they formed a corporation, and the present claim was, with other assets, assigned to the new company. Defendant says that this assignment was not so made as to vest title.

These questions are wholly immaterial, as far as defendant is concerned. It appears, as to the plaintiffs who are adjudicated bankrupts, that their estate has no interest in, and their assignee disclaims any right in, this cause of action. If the transfer to the company was not validly made, then the right of action did not pass to the new company; if the right of action did not pass, the undertaking for costs having been properly filed, the action is rightly continued, under our statute, in the name of the original party. Wag. Stat. 1050, sec. 9. The then plaintiffs, formerly composing the firm of Stilwell, Powell & Co., although adjudi-

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cated bankrupts after the commencement of the suit, even should it be held that the transfer to the company was not validly made before bankruptcy, would seem to be properly parties of record, the assignee not having asked to be substituted as a party. Plaintiffs then remain as nominal parties, and trustees for the real party in interest, if it should be the fact that their interest in this claim has, during the pendency of the suit, passed by operation of law to an assignee for their creditors.

In any case, there could be no second recovery of this claim against defendant by the assignee of Stilwell, Powell & Co., and the debt will be discharged by satisfaction of this judgment. If the defendants entertained any fear of paying to the wrong party, they should have filed a bill of interpleader.

The judgment of the Circuit Court is affirmed. The other judges concur.

MARTROM D. LEWIS, Administrator of BORNEFELD, Respondent, v. MICHAEL KINEALY *et al.*, Appellants.

April 10, 1876.

Where the intestate employed attorneys to bring a suit which was pending at the time of his death, and then revived in the name of his administrator, *held*, in a suit against the attorneys for the proceeds of the suit collected against them, that they could not offset their claim for professional services rendered to the intestate during his life-time, but were entitled to recover, as a set-off, the reasonable value of the services rendered to the administrator in prosecuting the suit after the intestate's death.

APPEAL from St. Louis Circuit Court.

Affirmed.

M. Kinealy, for appellants, cited: Frissell v. Hale, 18 Mo. 18–21; *In re* Paschal, 10 Wall. 438; Marshall v. Meich, 51 N. Y. 143; Am. Law Reg. (N. S.) 414, and note, 419; *Ex parte* Bush, 7 Vin. Abr. 74.

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Fisher & Rowell, for respondent, cited: 4 Johns. Ch. 13; 20 Johns. 137; 8 Wend. 210, 530; 10 Paige, 319; 6 Barb. 330. 2 Hill, 213; Woodward and Thornton, Admrs., *v.* McGaugh & Brown, 8 Mo. 161; Wag. Stat. 1273, 1274; Mercein *v.* Smith, Admr., 2 Hill, 213, Wilson, C. J.; Shannon's Admr. *v.* Dinan, 42 Mo. 269; Leessig *v.* Vertrus, 32 Mo. 431; 1 Am. Law Reg. 423; St. Johns *v.* Derfendorf, 12 Wend. 261; Waters *v.* Waters, 49 Mo. 288; Frisel *et al. v.* Hails, 18 Mo. 18.

BAKEWELL, J., delivered the opinion of the court.

The appellants are attorneys at law. This is a suit to recover $200, collected by them, out of which they claim to be entitled to retain $150, the value of their professional services. The intestate employed defendants to bring a suit which was pending at the time of his death, and which, after his death, was revived in the name of his administrator, and then compromised for $200, which was paid to defendants.

The services rendered during the life-time of the intestate were worth $125, and those rendered after his death were worth $25. The court, at the instance of plaintiff, declared the law to be—

1. "That defendants are not entitled to offset any claim or demand due them by Bornefeld at the time of his death, in this action."

2. "That defendants are not entitled to recover on their offset for any services rendered by them for Bornefeld, prior to his death, and are only entitled to recover, as a set-off, so much as the evidence shows the services rendered by them for said administrator, after said death, to be worth."

There was a verdict and judgment for plaintiff in accordance with these instructions. Defendants excepted, at the time, to the giving of the above instructions, and, a motion for a new trial being overruled, the cause is brought here by appeal.

It is contended by defendants that they have a lien upon

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the money of a client which they collected, for services rendered in and about the collection of the money, and on this ground they claim that, in this case, there was due by them to the administrator of Bornefeld the balance that remained in their hands after deducting the reasonable value of their services in the suit which culminated in this collection, and no more. But, in the case before us, Bornefeld was dead before the money was collected. They had no contract with him which gave them a vested right to prosecute this suit to a final determination.

During his life he might, had he chosen so to do, have dismissed the suit at any stage of the proceedings, and, had he been dishonest and insolvent, they would then have lost their fee, had he refused to pay. Now, when this money was actually collected by defendants, it no longer belonged to Bornefeld. He was dead; an administrator had been appointed, and to him this collection belonged.

Defendants were the attorneys for this administrator only in virtue of a new employment by him, and he was liable to them only for the services rendered after Bornefeld's death. At the time of Bornefeld's death they had no lien upon this fund, for it was not yet collected; they never had a lien upon the *chose in action*, and would not have had a lien upon the judgment had judgment been given. When the collection was made, the money belonged to the administrator, and they had a lien upon it for the services rendered to the administrator, but not for those rendered to Bornefeld before his death. The administrator, on taking charge of the estate, might have refused to allow this action, which abated with the death of Bornefeld, to be revived in his name, or, on its revival, he might have employed other counsel to prosecute it in his name. He could not have contracted to give the defendants a lien upon the fund, when collected, for their services during Bornefeld's life, in the matter of this collection, because that would have been unjust to the other creditors of Bornefeld.

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The *chose in action* became, on Bornefeld's death, an asset of his estate, to be distributed according to law, and upon this *chose in action* defendants confessedly had no lien. It is not as if defendants, at the time of Bornefeld's death, had been bailees of some specific article of personal property belonging to the intestate, with a right to retain it for services rendered in the care of the subject of the bailment. The *chose in action* was one thing, the money collected was a different thing.

This money was not collected during Bornefeld's life, and defendants were not bailees of Bornefeld of this fund.

The instructions of the court below were a correct declaration of the law of this case; and, there being no error in the record, the judgment of the Circuit Court will be affirmed. Judge GANTT concurs. Judge LEWIS did not sit.

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JACOB ECKERT, Respondent, *v.* ST. LOUIS TRANSFER COMPANY, Appellant.

April 10, 1876.

1. Where a juror is objected to as prejudiced, and qualifies himself under the statute and is accepted by the judge presiding on the trial, this court will not interfere.
2. Where a full panel of eighteen jurors was called, where only one juror is challenged by one of the parties, even though the court improperly refused a challenge for cause, no prejudice can arise to the party challenging, and the appellate court will not interfere.
3. The question in cases of liability of the master for the acts of the servant is not, whether the act of the servant is negligent or willful, but whether it is done whilst engaged in the master's business, and within the scope of the servant's employment.
4. Damages which give merely a full, round compensation for the injury done are not punitive.
5. Negligence of the plaintiff which does not directly contribute to the injury will not relieve the defendant from the consequence of negligence on his part which is the direct cause of the injury.

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APPEAL from St. Louis Circuit Court.

Affirmed.

S. M. Breckinridge, for appellant, cited: Hill on New Tr. (2d ed.) 184, sec. 44; Nevins *v.* State, 13 Smed. & M., 500, 509; Colton *v.* State, 31 Miss. 504; Chicago & Alton R. R. Co. *v.* Adler, 56 Ill. 344; Hudson *v.* St. Louis, Kansas City & Northern Ry. Co., 53 Mo. 255; Garretzen *v.* Duenckel, 50 Mo. 104; U. S. Bank *v.* Daniel, 12 Pet. 32; Patapasco, 12 Wall. 451; Rio Grande, 19 Wall. 178: Watson *v.* Vaughn, 23 Cal. 61; Skillman *v.* Lackland, 23 Cal. 198; Smith *v.* Smith, 15 Vt. 620; Knapp *v.* Banks, 2 How. 73; Walker *v.* United States, 4 Wall. 163.

F. & E. L. Gottschalk, for respondent, cited: Wag. Stat. 800, secs. 21, 22, 25; Wag. Stat. (1872) 1067, sec. 33; State *v.* Holme, 54 Mo. 158, 159; State *v.* Hays, 23 Mo. 287; Hill on New Tr. (2d ed.) 155, 156, secs. 4, 7; 2 Gra. & Wat. on New Tr. 468; Whittacker *v.* Carter, 4 Ired. 461; State *v.* Schaeffler, 3 Wis. 823; State *v.* Baldwin, 12 Mo. 223; State *v.* Scanlan, 58 Mo. 204; West *v.* Forrest, 22 Mo. 344; Freeman *v.* The People, 4 Denio, 31; Stewart *v.* State, 13 Ark. 742; McGowan *v.* State, 9 Yerg. 193; People *v.* Knickerbocker, 1 Park. Cr. 304; McComas *v.* Covenant Mutual Life Ins. Co., 56 Mo. 573 (see page 576); Hudson *v.* St. Louis, Kansas City & Northern Ry. Co., 53 Mo. 525, 536; State *v.* Davis, 29 Mo. 391, 397; State *v.* Rosel, 32 Mo. 346; State *v.* Miller, Southern Law Rev. (1874) 572; State *v.* Breen, 59 Mo. 413, 417; State *v.* Klinger, 46 Mo. 226; Coacker *v.* Chicago & Northwestern R. R. Co., 36 Wis. 657; Perkins *v.* Missouri, Kansas & Texas Ry. Co., 50 Mo. 202; Gillet *v.* Missouri Valley R. R. Co., 55 Mo. 315; Maleck *v.* R. R. Co., 57 Mo. 17; Goddard *v.* R. R. Co., 10 Am. Law Reg. 33; Harrison *v.* Stowe, 57 Mo. 93; Norton *v.* Ittner, 56 Mo. 351, 352; Wyatt *v.* City R. R. Co., 55 Mo. 485; Karle *v.* Kansas City, St. Jo. & Council Bluffs R. R. Co., 55 Mo. 476; Vaughn *v.* Searle, 30 Mo. 600; Liddy *v.* St. Louis R. R. Co., 40 Mo.

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506; New Orleans R. R. Co. *v.* Allbritain, 38 Miss. 242; 1 Redf. on Rys. 532, 534, secs. 2–4; Horne *v.* Newmarch, 12 Allen, 49.

BAKEWELL, J., delivered the opinion of the court.

This is a suit for damages for an injury caused to the plaintiff by the careless driving of one Eaton, an employee of defendant, while driving one of defendant's omnibuses, in the regular course of his employment.

The answer denies all the material allegations of plaintiff except the incorporation of defendant, and that its business was that of common carrier. It sets up, as affirmative matter of defense, that any injury done to plaintiff was caused by his own negligence, which allegation is denied in the replication.

No evidence was introduced by the defense. The testimony of the witnesses for plaintiff is quite accordant, and leaves no doubt as to the character of the transaction.

It appears that, on June 20, 1870, some delegates of musical societies in St. Louis, to the number of about 100, were returning from a festival at Cincinnati. At about ten o'clock at night, about fifty of their friends crossed the river by the ferry, to greet them on their return. These men were all together on the boat; most of them went on the main deck, the upper deck being somewhat crowded. The passengers returning from Cincinnati had, all of them, omnibus tickets; but few or none of them were in the omnibuses, as they preferred to be on deck, to talk to their friends. The omnibus driven by Eaton was empty. His omnibus and two others, and a baggage wagon, were the only vehicles on the ferry-boat. There was a crowd of fifty or 100 persons on the levee, who had come down to greet the returning party, but had not crossed the river. When the ferry-boat touched the shore, plaintiff and others went on board. Most of the crowd, amongst others the plaintiff, came off the boat by the lower bridge or gangway, over which carriages pass, instead of by the stair-way, built expressly for foot-pas-

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sengers, from the upper deck. The omnibus driven by Eaton had four horses. It was the first to leave the boat. He drove right into and among the crowd on the gangway and on the levee. When he reached the levee he took a slanting direction, owing, probably, to the steepness of the ascent, and, after driving over plaintiff and another man, and upsetting some, and compelling others on the bridge to jump into the river, he drove off rapidly to the stable, and was arrested there the next day, having attempted disguise by shaving off his beard.

The circumstances immediately attending the injury complained of were as follows: As the driver came on to the crowd passing off the gangway, many shouted to him to stop—that he would kill people. One witness seized a horse of his team by the head-gear, whilst on the gangway, to stop the omnibus; whereupon the driver rose in his box, struck witness and his horses with his whip, so that witness lost his balance and fell. As he struck, the driver shouted, "God damn you, let go that horse!" He was again shouted to to stop, when he drove up the bank as fast as he could, shouting, "Get out of my way. I don't care if I kill a hundred of you." Plaintiff was on the levee, in the crowd, and immediately in front of the exit from the ferry for foot-passengers, when the horses struck him before he could escape, threw him down, tramped on his leg and ankle, and a wheel of the omnibus passed over his thigh, not breaking the bone, but sliding along the bone of the leg, so as to draw down the muscular tissue from the thigh to the knee. He suffered excruciating pain, was for six weeks confined to his bed, under care of a physician, was more or less incapacitated for his business (that of a shoemaker) for many months, and at the date of the trial, nearly four years after the occurrence, he was still suffering from rheumatic pains, a consequence of the injury. His general health was impaired, and he was not able to work continuously, as before the injury. Before the accident he could

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earn from $5 to $7 a day; since that time he could not average over $7 a week. In bad weather he can hardly use his legs, and suffers very much; and this condition is likely to be permanent. It was fifteen weeks after the injury before plaintiff was able to work at all, and during the winter he was totally unable to work. His business was destroyed and he had to close his shop. The second winter after the occurrence he could work a little, but had to close up every two or three weeks. In summer, when he can work, there is hardly anything to do in his trade; and in winter, when the shoemaking trade is brisk, his suffering will not allow him to get about to seek it. The injuries were mainly to the ankle of one leg, from the horses' hoofs, and to the thigh of the other, from the wheel.

The instructions asked and refused will be set out, so far as is necessary, in the course of this opinion.

The jury found a verdict for plaintiff, and assessed his damages at $2,500. Motions for new trial and in arrest having been overruled, the case is brought to this court by appeal.

1. The first point insisted upon by defendant, as ground for reversal, is the action of the trial court in refusing to allow defendant to challenge, for cause, a juror named Willich.

A full panel of eighteen was called, and sworn to answer questions. Willich said he had heard of the occurrence, at the time, in connection with the injury then done by the same driver to a man named Gericke; that he was a newspaper reporter, had examined into the facts, formed an opinion, and written and published a statement of the case of Gericke. He had no present recollection of the facts. What he might know of the facts from hearsay would not, the witness said, influence his opinion. The court considered the juror competent, and defendant challenged him peremptorily, and challenged no other person on the panel. Exceptions were duly saved to the action of the court.

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The first question that arises is, was Willich a competent juror?

The law provides (Wag. Stat. 800, sec. 22) that no person is competent as a juror "who has formed or expressed an opinion concerning the matter, or any material fact in controversy, which may influence his judgment."

The facts in the Gericke case were unquestionably material facts in the case at bar. As to these facts, the juror had formed and expressed an opinion at a period nearly four years before the date of the trial at which he was examined as a juror. He had forgotten the facts of the case. This is not important, as there can be no doubt that the facts as formerly learned by him, and also the opinion he had formed and expressed, would return to his mind, by association of ideas, during the trial, however completely forgotten at the time. This is a psychological fact as to which there can be no reasonable doubt. But the juror swore that his judgment would not be influenced by his former knowledge. This is the material point. It has been judicially determined, in this State, that the opinion which renders a juror incompetent must be such as would influence his judgment. *McComas* v. *Covenant Life Ins. Co.*, 56 Mo. 573.

Owing to the difficulty of procuring a jury free from impressions—a difficulty which almost amounted to indemnity for crime—a legislative enactment was passed long ago, in this State, and is still in force, to the effect that, in criminal cases, a juror who has formed and expressed an opinion may be sworn, provided it is formed only on rumor, and not such as to prejudice his mind. Wag. Stat. 1103, sec. 13. In a murder case, a juror having read of the case in the papers, and formed an opinion, but declaring he had no prejudice, was accepted. This was assigned for error, and the Supreme Court said (*Baldwin* v. *The State*, 12 Mo. 223): "If the question of competency was referable to the juror himself, he was competent. But it was not his

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province to pass upon the question. He could only state facts, and it was the duty of the court to determine whether, under the facts, he was competent. In deciding this question, the presiding judge at the trial, having this juror before him, witnessing the manner of his examination, possessing a knowledge of his character, is infinitely better qualified to decide than we are whether, under all the circumstances, his mind and feelings are in a condition which will enable him to discharge honestly and impartially his duty as a juror. Where the juror qualifies himself under the statute, and the presiding judge accepts him, this court cannot say that error has been committed." And in *The State* v. *Davis*, 29 Mo. 391, the Supreme Court says that, unless this rule is adhered to, competent jurors cannot be obtained. In *The State* v. *Rose*, a juror who had heard the alleged facts of the case, which were fresh in his mind, and who said that his mind was "fixed and made," if the facts appeared on the trial as he had heard them detailed, was accepted as competent. Bound, as we are, by these opinions, we cannot see clearly that the court below committed error in accepting this juror. There was, probably, something in his manner of answering the questions, and in his general appearance, which gave to the learned judge an assurance of his want of undue bias, which is not so strongly felt from a mere perusal of the record. We cannot legally interfere with this action of the trial court in this case.

We are also of opinion that, had he been incompetent, no error was committed against the appellant materially affecting the merits of the action. Where this is the case we cannot interfere. Wag. Stat. 1067, sec. 33.

There was a full panel of eighteen jurors in this case. Under the law, the first twelve names on the list are the trial jury. The plaintiff must first announce his challenges, and he made none. The defendant exercised his right of peremptory challenge but once. Now, in what way can he possibly be affected by the fact that Willich, the only man

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challenged, was challenged peremptorily instead of for cause, and that upon him was exhausted one challenge, when two challenges remained of which defendant declined to avail himself? Willich was gone, and defendant wished him away. It can only be said that defendant wished, for some special reason, to reach and have on the panel the sixteenth juror, and that he could only effect this by having four challenges, one for cause and three peremptory; but that—this object being defeated by the denial of the challenge for cause—defendant had no further reason for exercising his other two remaining challenges, and, therefore, against his will, accepted the jury as it was, without further challenge. But that he was, as he undoubtedly was, thus deprived of the power of selecting a particular juror, has been decided to be no injury to the rights of a litigant. This question has been authoritatively determined in this State (*State* v. *Hays*, 23 Mo. 287; *State* v. *Holme*, 54 Mo. 153), and, as it manifestly appears that defendant was in no way prejudiced by the action of the trial court in accepting this juror, except on the erroneous theory that peremptory challenge means the right to select, not the mere right to *exclude*, there was here no error of which defendant can complain.

2. The following instructions were given to the jury, at the instance of plaintiff:

1. "If the jury find from the evidence that a driver of defendant, while in the course of his employment, drove defendant's omnibus and horses in so negligent and careless manner as to run over plaintiff and injure him, without any negligence or want of care on the part of plaintiff contributing directly to the happening of said injuries, then they will find for plaintiff."

2. "If the jury find for the plaintiff, they will assess his damages at such a sum, not exceeding $5,000, as they believe from the evidence to be a reasonable compensation for the injuries he has sustained, the pain and suffering caused thereby, the expense of his medical treatment for

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such injuries, and the loss of time resulting from such injuries, if any such have been shown in evidence; and, in assessing the damages, the jury will take into consideration the nature of the injuries—whether or not they are of a permanent character; how, if at all, they will affect the ability of plaintiff in the future to earn a living; how, if at all, they will affect his future health; and what pain and suffering, if any, they will hereafter cause to the plaintiff."

To the giving of these instructions defendant excepted.

The following instruction was given at the instance of the defendant:

"If the jury believe from the evidence that the carelessness, negligence, or imprudence of the plaintiff contributed directly to the injury, or if the jury find from the evidence that the driver of the omnibus willfully caused the injury, not to promote the interest of his employer, nor within the scope of his employment, but out of malice, ill-will, or anger, and for purposes of his own solely, the jury will find for the defendant."

Twelve instructions asked by defendant were refused. These instructions were to the effect that punitive damages could not be given; that the measure of damage is compensation for his loss of time and money expended; that, if the injury was done willfully or maliciously by the driver, or to effect a purpose of his own, or from spite—whether against plaintiff or others—or that, though driving defendant's omnibus, he was not engaged in serving it at the time, or that plaintiff, by his negligence in using the wrong exit from the ferry, contributed to the injury, then plaintiff cannot recover. To the refusal of these instructions defendant excepted.

The doctrine of this case is now pretty well settled in this State, and the instructions given put the case to the jury even less favorably than plaintiff might have demanded. There is nothing in the law given by the court of which defendant can complain.

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"The test of defendant's liability," as is said in a similar case in Massachusetts, by Judge Hoar (*Howe* v. *Newmarch*, 12 Allen 49), "is, not the intention of the servant, but the fact that the injurious act was done while engaged in his master's business, and within the scope of his duty as a servant. If the act of driving over the plaintiff was done willfully, still it may also have been done negligently, in the view of the law. The test of the master's liability is not whether the servant was a trespasser. The master is no more consenting to the thoughtless negligence of his servant than to his willful negligence."

The question, in cases of this kind, is not whether the act of the servant is negligent or willful, and *McManus* v. *Crickett*, 1 East, as is said by Judge Redfield (Redf. on Neg. 534), has either been misunderstood or is not law in America. It certainly is not in Missouri. The inquiry is whether the act was done in the course of the servant's employment. The argument that, when the servant acts willfully, he *ipso facto* leaves the employment of the master for the minute or so that his passion rages, is rightly characterized as a specious fallacy. If an engineer of a road purposely runs over a cow, the road is as much liable as if he did it carelessly. He is driving their locomotive and acting as their servant, with the means of mischief they have intrusted to him. The master, in case of negligence or willfulness, is liable, not so much for having impliedly authorized the act, as for having employed a faithless servant, who did the injury in the course of his employment. These are the views adopted by Judge Redfield, after a careful consideration of the authorities, and these views seem to be fully sanctioned by the more recent decisions on these subjects in our own State.

The universally recognized rule is that the principal is civilly liable for neglect, fraud, or other wrongful acts of his agent in the course of his employment, though the prin-

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cipal did not authorize the specific act. *Garretzen* v. *Duenckel*, 50 Mo. 104.

Corporations, says the Supreme Court of this State, in *Perkins* v. *Missouri, Kansas & Texas Railway*, only act by agencies, and whatever agents do within the scope of their authority is the act of the corporation, and if agents, in acting within the scope of their authority, act in a willful and malignant manner, and damage any one, they are certainly responsible; and in *Gillett* v. *Missouri Valley Railroad*, 55 Mo. 315, and *Malecek* v. *Tower Grove Railroad*, 57 Mo. 17, corporations are held liable for the malicious acts of their agents, and it is held that exemplary damages may be recovered against a corporation for the wanton, malicious, and oppressive acts of its servants. *Buckley* v. *Knapp*, 48 Mo. 152.

Damages, however, which give merely a full compensation for the injury done are not punitive, and were allowed without hesitation when it was doubted whether punitive damages could be given at all in a civil case. *McKeon* v. *Citizens' Railroad Company*, 42 Mo. 79. The damages given in the case before us are clearly no more than a fair and reasonable compensation for the injury done to the plaintiff by the wanton act of defendant's servant.

The instruction as to contributory negligence, by using the wrong exit from the boat, was properly refused. Whether the plaintiff left the ferry-boat by the proper exit, or not, could not be material, since he was run over, not on the bridge-way, but on the levee in front of the regular passenger exit, and after he had entirely left the boat.

On the facts in evidence, the plaintiff was clearly entitled to recover, and the damages given are no more than a round compensation for his pain, loss of time, and permanent disablement.

It is urged that the court erred in refusing to admit evidence of proceedings in the Police Court and Court of Criminal Correction, against the driver, for careless driving

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and for the assault. There was no error in this. These proceedings could not be competent evidence in this case for any purpose.

We see no error in this record. The judgment of the Circuit Court is affirmed. The other judges concur.

ERNEST STEINER, Respondent, *v.* WILLIAM MORAN, Appellant.

April 10, 1876.

1. Though the testimony for one side of an issue may appear to be entirely satisfactory, a verdict for the other will not be disturbed if there is some testimony in the cause tending to disprove the former.
2. Action for damages sustained by an employé, in consequence of failure by his employer, the defendant, proprietor of a brewery, to provide sufficient guards and appliances for the prevention of accidents on the premises; form and substance of instructions on both sides approved, as in harmony with former decisions in this State and elsewhere.
3. Instructions for defendant, to the effect that, if the plaintiff knew of the opening through which he fell, and that it was carelessly kept, and yet continued to work on the premises, he did so at his own risk, and could not recover, were properly refused.

APPEAL from St. Louis Circuit Court.

Affirmed.

A. J. P. Garesché, for appellant, cited: Dascomb *v.* Buffalo & Lake Shore R. R. Co., 27 Barb. 221; Herring *v.* Wilmington & Raleigh R. R. Co., 10 Ired. 407; Spofford *v.* Harlow, 3 Allen, 179; Boland and wife *v.* Missouri R. R. Co., 36 Mo. 492; Callahan *v.* Warne, 40 Mo. 136; Pittsburgh *v.* Evans, 53 Penn. 255; Shear. & Redf. on Neg. (3d ed.), sec. 86, p. 128, sec. 99; Hill. on Torts (4th ed.), 463; Id. (2d ed.) 460, 461; McDermott *v.* Pacific R. R. Co., 30 Mo. 117; Devitt *v.* Pacific R. R. Co., 50 Mo. 305; Honder *v.* Baltimore R. R. Co., 32 Md. 411; Smith *v.* City of St. Joseph, 45 Mo. 449; Walsh *v.* Missis-

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sippi Tr. Co., 52 Mo. 438; Wyatt *v.* Citizens' R. R. Co., 55 Mo. 485.

Gottschalk, for respondent, cited: Walsh *v.* Mississippi Tr. Co., 52 Mo. 434; Smith *v.* City of St. Joseph, 45 Mo. 449; Wyatt *v.* Citizens' R. R. Co., 55 Mo. 485.

Lewis, J., delivered the opinion of the court.

Plaintiff, a workman in defendant's brewery, sued for $5,000 damages, on account of injuries resulting from a fall through an air-hole into a cellar on the premises, while engaged in the line of his duty as defendant's employé. He obtained a verdict of $500; from the judgment upon which defendant appeals.

The testimony tended to show that the plaintiff went to work for defendant on February 19, 1873, and the mishap occurred the evening of the next day, after dark. That the air-hole was in or near a passage-way through which plaintiff had to pass, where there were no lights, nor any guard or other method of warning about the opening. Slats, about two and a half inches apart, had been placed across the opening, but it was observed, some two or three hours after the accident, that one or two of them had been broken out. The plaintiff was sufficiently injured by the fall to be unable to work in the ensuing six months.

There was, as nearly always happens in similar cases, a good deal of conflicting testimony. Abundant material, which the counsel here utilizes with undeniable force, is thus furnished for an argument in defendant's behalf upon the facts in the case. It is shown to us that the statements of some of the witnesses tend to establish theories utterly inconsistent with any right of recovery in the plaintiff; as, that the widest opening left by broken slats was only eight inches, through which the plaintiff could not possibly have fallen; that plaintiff, as a brewer of fifteen years' experience, must have known that air-holes were necessary in every brewery, and, therefore, he knew all about this one, or else was guilty of gross negligence in not finding it out;

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that plaintiff was furnished by defendant with a light, but willfully refused to make such a use of it as would have prevented the accident, etc. But however we might be convinced, by the able argument of counsel, that we could never render a like verdict upon the same testimony, we would be precluded by long settled law from giving practical effect to such a conviction in the present case. There was at least some testimony tending to disprove every theory upon which the defendant so insists; and, the jury having discharged their exclusive function of determining which side is entitled to prevail, we have no authority to disturb their verdict. An unavoidable application of this indispensable rule disposes of numerous points made by counsel for appellant to show that the verdict was against the evidence. The only exceptions saved were to the giving or refusing of instructions, and to the overruling of the application for a new trial. These matters, therefore, must comprehend the limits of our review. The instructions given for the plaintiff were as follows:

"The court instructs the jury that, if they find for the plaintiff, they will assess his damages at such a sum, not exceeding $5,000, as they believe from the evidence to be a reasonable compensation for the injuries he has sustained, the pain and suffering caused thereby, the expenses of his medical treatment for such injuries, and the loss of time resulting from such injuries, if any such have been shown in evidence; and, in assessing the damages, the jury will take into consideration the nature of the injuries, whether or not they are of a permanent character; how, if at all, they will affect the ability of plaintiff in the future to earn a living; how, if at all, they will affect his future health; and what pain and suffering they will hereafter cause to the plaintiff."

"The court instructs the jury that, if they believe from the evidence that in or near the passage-way which plaintiff had to use, in order to attend to his duties in the brewery

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of defendent, there was, at the time of the happening of the injuries complained of, an air-hole or other opening, and that the same was insecurely guarded or protected, or not, or insufficiently, provided with lights to warn persons passing by there; that defendant either knew, or might have known, the unsafe condition of such air-hole or opening, by the exercise of reasonable care and diligence; and that plaintiff, while on his way to the brewery in order to attend to his business, and while using ordinary care and prudence, fell in or through said hole, and received the injuries complained of, by reason of the unsafe condition or insufficient protection of such opening, then the defendant is liable in this action, and the jury will find for the plaintiff."

"The jury are instructed that, although they may believe from the evidence that the plaintiff failed to exercise ordinary care and prudence while going to the brewery, which may have contributed only remotely to his injury, yet, if they believe from the evidence that the defendant was guilty of negligence which was the immediate cause of said injuries, and that, with the exercise of reasonable care and prudence on the part of defendant, said injuries might have been prevented, then the defendant is liable in this action, and the jury will find for plaintiff."

Upon defendant's application, the jury were instructed as follows:

"If the jury believe from the evidence that defendant provided for the air-hole or opening, through which plaintiff is alleged to have fallen, all the appliances reasonably necessary for the safety of the parties in his employ, and that such opening with such appliances had not been allowed to get out of repair through the neglect of defendant, but the plaintiff's own carelessness directly contributed to his injury, or the carelessness or negligence of his fellow-servants, then he cannot recover."

"The jury are instructed that, if they believe from the evidence that plaintiff by his own negligence directly contri-

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buted to the accident which resulted in his injury, they will find for defendant."

"The jury are instructed that, if they believe from the evidence that defendant, by slats or otherwise, provided a suitable and safe covering or guard to prevent persons from falling through the air-hole or opening through which plaintiff is alleged to have fallen, and that the accident occurred through the negligence or fault of plaintiff's co-employés in not placing, or improperly placing, the slats or other safeguards provided by defendant for protection against such an accident, the jury will find for the defendant."

These instructions put the law of the case so fully and so fairly before the jury that we fail to discover in what particular they could have been substantially improved. In those features whereof the defendant may be supposed most likely to complain, they are emphatically sanctioned by our Supreme Court, in *Walsh* v. *Mississippi Transportation Company*, 52 Mo. 434, and in other cases there cited.

The court refused defendant's prayer for instructions as follows:

"If the jury believe from the evidence that plaintiff knew of the opening in question, and also knew that, though sometimes covered, it was at other times left uncovered and unguarded, but that plaintiff, aware of all this, nevertheless consented to work for the defendant, plaintiff did so at his own risk, and plaintiff cannot recover in this case."

"Although the jury should believe from the evidence that there were defects in the air-hole or opening through which plaintiff is alleged to have fallen, and which occasioned his injury, still, if they believe from the evidence that plaintiff continued to work for defendant, knowing of these defects, he did so at his own risk, and plaintiff cannot recover."

No testimony was given upon which either of these instructions could be justly based. It was not attempted to be shown that the plaintiff knew of the existence of this particular air-hole—where it was, how it was used, or what

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were its defects, otherwise than by his general knowledge, as a practical brewer, that air-holes were necessary to all breweries. He himself testified that he had come to the brewery only on the day next before that of the accident; that he "never took any notice where the air-holes were," and that nobody told him about this one. There was, moreover, testimony tending to show that its guards were, contrary to prevailing custom, even with, instead of above, the ground-level, and that it was situated where it would not be likely to attract special attention.

We can find in the record no error to justify a reversal, and must, therefore, affirm the judgment. The other judges concur.

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JOHN A. DENNY, Appellant, *v.* HENRY S. TURNER, Executor of L. A. BENOIST, *et al.*, Respondents.

April 10, 1876.

1. The common-law rights of a surviving partner are not interfered with by our probate statutes, except in so far as the latter operate to secure a fair settlement of the partnership affairs, and a just distribution of the assets.
2. Where a claim against a partnership estate is acknowledged to be just by the surviving partners administering, and they undertake to pay it as soon as the assets will enable them, after which more than two years elapse before it is presented for allowance in the Probate Court—the executor of the deceased partner having, meanwhile, succeeded to the administration of the partnership effects—it will not be barred by the statutory limitation, if two years have not elapsed since the grant of letters to the executor on the partnership estate.

APPEAL from St. Louis Circuit Court.

Reversed and judgment.

E. B. Sherzer, for appellant, cited: Wag. Stat. 80, secs. 63, 64; Wag. Stat. 104, sec. 15, p. 81, sec. 66; Kidd *v.* Chapman, 2 Barb. 422; Taylor *v.* Woods, 36 Mo. 73–79; Grimes, Admr., *v.* Bush, 16 Ark. 647; Perry *v.* West's Admr., 40 Miss. 233; Williamson *v.* Anthony, Admr., 47

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Mo. 299; Bryan *v.* Manday, 17 Mo. 556; Van Saun *v.* Farley, 4 Daly, 165; Elliott *v.* Cook's Admr., 13 Wend. 35; Cullanan *v.* McClure, 47 Barb. 206; Brodrick *v.* Smith, 3 Lans. 26; Little *v.* Little, 36 N. H. 224.

A. & J. F. Lee, jr., for respondents, cited: Wag. Stat., secs. 52–64, pp. 78–80; Wag. Stat., secs. 15–19, pp. 104, 86; McCluny *v.* Sillman, 3 Pet. 270; Miller *v.* Janney's Exr., 15 Mo. 268.

LEWIS, J., delivered the opinion of the court.

This proceeding originated in the St. Louis Probate Court. Plaintiff there undertook to establish his demand against the partnership estate of L. A. Benoist & Co., then in process of administration by the defendant, who was also executor of L. A. Benoist, deceased, formerly a member of the firm. The Probate Court refused to allow the claim, and a like result followed plaintiff's appeal to the Circuit Court. The facts were as follows:

Louis A. Benoist, James Murrin, and Bolivar Owen composed the banking firm of L. A. Benoist & Co. On March 23, 1865, plaintiff deposited with the firm $500 in gold, receiving a certificate of deposit in the usual form. Benoist died early in the year 1867, and, in February of the same year, Murrin and Owen, as surviving partners, gave bond according to law, and proceeded to settle up the partnership affairs, without, however, publishing any notice, as required by the general law concerning administrators. Within two years thereafter plaintiff presented his certificate of deposit to the surviving partners, demanding repayment of the money. They acknowledged the justice of the claim, and promised to satisfy it as soon as sufficient assets should come into their hands. They had paid off similar certificates held by other parties, and had included this in their schedule of the partnership liabilities filed in the Probate Court. They promised, and fully expected, to pay this claim, up to the time when the partnership estate was taken out of their hands and turned over to the defendant,

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in February, 1871. On January 8, 1873, the defendant, as executor of L. A. Benoist, deceased, having in charge the partnership estate of the late firm, waived notice in the Probate Court, when the demand was presented for allowance, and was disallowed, as being barred by the statutory limitation of two years.

Section 63, on page 80, Wagner's Statutes, provides as follows: "In all cases where the surviving partner administers upon the partnership effects, he shall have power to pay off demands against the partnership without requiring the same to be exhibited for allowance to the court; and such court shall allow such partner in his settlements, as credits, all demands which he may thus discharge, if it shall be satisfied of the justness of the demands; but, where such partner shall refuse to pay demands against the partnership, and where the administrator or executor of the deceased partner takes charge of the partnership effects, all such demands shall be exhibited to the proper court for allowance and classification," etc.

The 64th section provides that "all demands presented for allowance or payment, against the partnership effects, within the first year after the grant of administration thereon, shall be placed in the first class; and all other demands, presented or paid within two years after such grant, shall be placed in the second class; and all demands not presented or paid within such two years shall be forever barred against the partnership effects administered."

In the courts below, these statutory provisions were held to be conclusive against the plaintiff's demand, since it was not presented for allowance in the Probate Court until after the lapse of two years from the undertaking by the surviving partners to administer the partnership effects. Was such an application of the statute within its true intent? Did the surviving partners "refuse to pay" this demand, so as to necessitate its allowance by the Probate Court within the time so limited?

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It must be observed that our statutes nowhere mention the granting of letters of administration to a surviving partner. By the spirit and effect of our legislation, his common-law rights are left untouched, with the single proviso that he shall give security for a fair and proper settlement of the partnership affairs, and a just distribution of the assets.

In *Green's Administrator* v. *Virden*, 22 Mo. 506, the County Court had undertaken to revoke the powers of a surviving partner, under the statute which authorizes such a proceeding in the case of an executor or administrator who has become non-resident of the State. But the Supreme Court denied the application of the statute to a non-resident surviving partner, declaring that "it would be against all principle to assume by implication a power of taking away the right of control which a man has over his own property." In *Crow* v. *Weidner*, 36 Mo. 412, the attempt was made to hold a surviving partner responsible for having exhausted the partnership fund upon certain claims, which were paid in full, when, it was insisted, all should have been classified and paid *pro rata* under the 64th (then 63d) section above quoted.

The Supreme Court held that the section "had no application to him, but only to the administrator of the deceased partner's estate, in respect to the excess of funds which he might receive from the surviving partner," etc. It followed that the surviving partner was not bound to such classification, but that his actual payments were conclusive, without regard to the statutory priorities insisted upon. In *The State to use of Taylor* v. *Woods*, 36 Mo. 73, it was held that, to entitle a creditor to sue upon the surviving partner's bond, it was necessary that his demand should have been presented either to the surviving partner for payment, or to the Probate Court for classification. Said the court: "What are the partnership debts to which this (partnership) fund must be applied? Evidently the debts that are recognized as such by the surviving partner, and those that have been

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allowed by the Probate Court. * * * There is no allegation that this claim was ever presented to the survivor for payment, or to the Probate Court for allowance."

From these adjudications it is manifest that the acknowledgment by a surviving partner, having in charge the partnership affairs, of the justice of a demand against the late firm, is placed upon the same footing as an allowance, under appropriate circumstances, by the Probate Court. The interest of the survivor is so clearly against any diminution of his own share in the partnership effects, by the payment of unjust demands against them, that the law requires no further proof of the justice of a claim, when he has practically admitted it. This absolute equality of authoritative effect seems, indeed, to be sufficiently implied in the language of the statute itself: "All demands presented for *allowance or payment*," etc.—*i. e.*, presented for allowance to the Probate Court, or for payment to the surviving partner. The authority thus recognized in the survivor is, practically, a power of adjudication upon the merits of the claim.

With these conclusions the interpretation adopted by the courts below, and here insisted on by the respondent, are irreconcilable. The surviving partners did not "refuse to pay" in the sense intended by the statute. On the contrary, they agreed to pay the plaintiff's demand, and were only prevented from so doing by a want of present assets; which would have been equally potent against an allowance by the Probate Court. The recognition and approval of the claim by the survivors entitles the claimant to assume that he has done all that the law requires to insure its payment as soon as the condition of the assets will allow. It would be a great hardship if he should be afterwards told that, by reason of a delay in gathering the assets, he must be placed in the same position as if he had never applied for payment, or as if, upon such application, the surviving partners had rejected his demand.

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It may be claimed that, when the administration has passed from the survivor to the administrator of the deceased partner, the claimant cannot avail himself of his presentation to the former, but must then have it regularly allowed by the Probate Court. This is, doubtless, true. But it is because—with the new form of administration—the new duty is introduced. If, up to this point, the claimant is guilty of no laches, it cannot afterwards be imputed to him, unless for an omission touching the new duty. He must then present his claim "for allowance" within two years after the "grant of administration." We have already suggested that there is, literally, no grant of administration to a surviving partner. He has already a common-law right to settle up the partnership affairs. The statute grants him nothing in addition, but simply limits the exercise of the right within certain conditions. By dating the "grant of administration" from the accession of the executor or administrator, and not from the giving of bond by the survivor, we establish a harmony among all the statutory provisions and the adjudications above referred to, which would otherwise be unattainable.

It follows, from this treatment of the subject, that the plaintiff, having properly rested upon the promises of the surviving partners so long as the partnership fund was at their disposal, was only bound to present his claim for allowance within two years after the grant of administration to the defendant upon the partnership effects. This he has done, and was, therefore, entitled to have it allowed upon proper proof of its merits. The judgment is reversed, and, as there appears to be no question about the merits of the demand, judgment will be rendered here in appellant's favor for the amount of the certificate of deposit, payable in gold, with interest at 6 per cent. per annum from February 26, 1869. Leave is given the respondent to show cause within ten days why this final judgment on the merits should be set aside, and the cause remanded. All the judges concur.

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CENTRAL SAVINGS BANK, Plaintiff in Error, *v.* A. B. GARRISON *et al.*, Defendants in Error.

April 10, 1876.

An acknowledgment of notice of transfer, signed in blank by the warehouseman on a warehouse receipt—the name of the transferee being omitted—will hold the signers to every responsibility as bailees of the transferee, whose name may be afterwards inserted, whether in fact known to them as such or not.

ERROR to St. Louis Circuit Court.

Reversed and remanded.

Farish & Griffin, for plaintiff in error, cited: Wag. Stat. 220, secs. 6, 7; Lubrik *v.* Inglis, 1 Stark. 104; Willard *v.* Bridge, 4 Barb. 461.

Cline, Jamison & Day, for defendants in error, cited: Baxter *v.* Wilkinson, 18 Vt. 190; 2 Redf. on Rys. 140, sec. 168; Story on Bail. (8th ed.), sec. 450; Bliver *v.* Hudson River R. R. Co., 35 Barb. 196; Stiles *v.* Davis & Barton, 1 Black. 105.

LEWIS, J., delivered the opinion of the court.

An agreed statement of facts in this cause is to the effect following: Defendants were general warehousemen in September, 1872, and received from one Quinn, on storage, a lot of whisky and wine, giving him a negotiable warehouse receipt therefor. Quinn thereupon transferred the receipt to plaintiff as collateral security for a loan of $200, giving his note for the amount, with an agreement showing the details of the transaction. Afterwards the goods were attached by a creditor of Quinn's and sold by the sheriff under execution upon the judgment which ensued. Quinn having absconded, this suit was instituted to indemnify plaintiff for its loss of the security upon the loan made to him.

The warehouse receipt was regularly indorsed by Quinn to the plaintiff, and bore a written or printed acknowledgment of notice of transfer, signed in blank (the name of

the transferee being omitted) by the defendants. The defendants had, however, no actual notice or knowledge of the transfer to plaintiff until after the sheriff's sale of the property, nor had the plaintiff until after the same event, any notice of the attachment proceedings.

Defendants paid no attention to the attachment suit, or the seizure and sale, but permitted them to take their course. The case being submitted to the court, without a jury, upon the agreed facts, judgment was rendered for the defendants. This action may be regarded as the sustaining of a demurrer to the evidence, and will be so considered here.

Our statute makes warehouse receipts negotiable, by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes. It makes the transferee the owner of the goods, wares, etc., represented by the receipt, and prohibits the delivery of such goods to any person except on surrender and cancellation of the receipt. So far, the law would appear to hold the defendants accountable to the plaintiff for failure of duty arising out of the relations to each other and to the property. Plaintiff insists that defendants were bound to hold the property against all comers until the surrender and cancellation of the receipt; that the duty and right so to do, being commanded by statute, cannot be interfered with, even by a public officer. That it was at least their duty to defend the attachment seizure, which they could have done successfully, by virtue of their special property in the goods thus secured to them by law.

Defendants, on the other hand, show, from several high authorities, that a warehouseman or carrier has no right to hold personal property against an execution or attachment in the hands of an officer, and that his responsibility to the owner ceases upon a seizure by such means, even though the suit be between entire strangers. But all discussion upon these matters seems to be superseded by an additional provision of the statute. By section 10 of the same act

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(Wag. Stat. 221) it is declared that "so much of the preceding sections of this act as forbids the delivery of property, except on surrender and cancellation of the original receipt or bill of lading, * * * shall not apply to property replevied or removed by operation of law." Here is a complete defense against plaintiff's claims in this relation.

But there was another incident in the transactions, whose influence lies in a different direction. The defendants signed, in blank, an acknowledgment of notice of the transfer of their receipt. The omission of the name of the transferee simply gave to a *bona fide* holder the right to fill the blank at any time, even at the trial, if necessary. Was the effect of this acknowledgment materially changed by the fact that defendants had no actual knowledge of the party to whom the transfer was made? Let us first inquire what would have been the effect of such actual knowledge if present. The defendants would thereby have become bailees of the plaintiff for all purposes. Upon the levying of the attachment, their first duty would unquestionably have been to inform plaintiff of the fact, so that it might protect its property by the means which the law has provided. This duty would have involved a liability for all damages resulting to the plaintiff if they failed to perform it.

The written acknowledgment of notice, signed by the defendants, was at least an admission that they assumed all the responsibilities which would attach to notice in fact. It was a waiver of further notice. It was a declaration to the transferee, whomever he might be, that he might treat them, in every respect, as his acknowledged bailees, and that they would never attempt, upon any plea of want of notice, to evade the duties and liabilities belonging to that position. It was upon this information, thus given to plaintiff, that the latter advanced its money to Quinn. The law of estoppel can find no better application in the range

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of human affairs. To permit the defendants now to deny actual notice of the plaintiff's rights as transferee, with a claim of immunity from the legitimate consequences of such notice, would be to repudiate all the learning on that subject. However honest may have been the defendants' intentions in the present case, we cannot thus open a door to possible frauds in commercial circles, where fair dealing is of paramount interest to the entire public at large.

It thus appears to us that a very important feature in the plaintiff's rights was ignored by the Circuit Court. For this reason the judgment is reversed and the cause remanded. Judge GANTT concurs; Judge BAKEWELL, who was of counsel in the case below, not sitting.

JOSHUA FINE, Appellant, v. D. C. HORNSBY, Respondent.

April 10, 1876.

1. **Shares of stock in a corporation are goods, wares, and merchandise, within the meaning of the statute of frauds, so as to require a note or memorandum in writing to validate a sale.**
2. **A having purchased shares of B, an agreement that the transaction shall be considered as canceled cannot be made the foundation of an action by A against B, as for a resale of the shares to B.**

APPEAL from St. Louis Circuit Court.

Affirmed.

Marshall & Barclay, for appellant, cited: Chitty on Con. (10th Am. ed.) 409, 419, 422; Bradley v. Holdsworth, 3 M. & W. 422; Kemble v. Mitchell, 11 A. & E. 205; Watson v. Sprathy, 10 Exch. 222; Fine v. Rogers, 15 Mo. 315; Kerr v. Bell, 44 Mo. 120; Story on Sales (3d ed.), sec. 277; Bass v. Walsh, 39 Mo. 199; Leonard v. Davis, 1 Black, 476; Glasgow v. Nicholson, 25 Mo. 30; Edan v. Dudfield, 1 Q. B. 302; Means v. Williamson, 37 Me. 536; Handlette v. Tallman, 14 Me. 400; Barrett v. Goddart,

3 Mason, 107; Williams *v.* Evans, Admr., 39 Mo. 201; Houghtaling *v.* Ball, 19 Mo. 84; Phillips *v.* Brestollé, 2 B. & C. 511; 9 Eng. Cr. Law Rep. 162; Bass *v.* Walsh, 39 Mo. 192, 198; Dyer *v.* Libby, 61 Me. 45.

Dryden & Dryden, for respondent, cited: Tisdale *v.* Harris, 20 Pick. 9; North *v.* Forrest, 15 Con. 400, 404; Gadsder *v.* Lance, 1 McMull. Eq. 91; Life Ins. Co. *v.* Cole, 4 Fla. 359; Baldwin *v.* Williams, 3 Metc. 367, 368; 3 Pars. on Con. (5th ed.) 49, 50, and note; Colvin *v.* Williams, 3 Har. & J. 38; Schouler on Pers. Prop. (1st ed.) 39, 40; Bouv. L. Dic., title Goods; United States *v.* Moulton, 5 Mason, 537; Gooch *v.* Holmes, 41 Me. 523; Eastern R. R. Co. *v.* Benedict, 10 Gray, 212; Riggs *v.* Magruder, 2 Cranch C. Ct. 143; White, Exr., *v.* Salisbury, 33 Mo. 153; Lillywhite *v.* Devereux, 15 M. & W. 285, 290; Glasgow *v.* Nicholson, 25 Mo. 30; Bass *v.* Walsh, 39 Mo. 197; Stindler *v.* Houston, 1 Comst. 261; Archer *v.* Zele, 5 Hill, 205; Ely *v.* Ormsby, 12 Barb. 570.

LEWIS, J., delivered the opinion of the court.

The petition alleged, in substance, that in the year 1869 plaintiff purchased from defendant an interest of one-fourth in the Missouri Lime Company, and paid therefor the sum of $2,000. That afterwards, in October or November, 1869, by a verbal agreement, defendant agreed to purchase said interest from plaintiff, and to pay him therefor the sum of $2,000, with interest at 10 per cent. That plaintiff then and there gave up and transferred said interest to defendant, but defendant had hitherto failed and refused to pay said purchase price, or any part thereof; whereof plaintiff asks judgment, etc.

The answer denied, generally, the allegations in the petition, and averred that in August, 1869, defendant, acting as agent for one Petitjohn, and not on his own account, sold to plaintiff the one-half of fifteen shares of stock owned by said Petitjohn in the Missouri Lime Company, a body cor-

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porate under the laws of Missouri, for which plaintiff paid to defendant, as such agent, and not otherwise, the sum of $2,000, in part of the purchase money. In further denial of the alleged subsequent sale by plaintiff to defendant, it was claimed that such supposed sale was a contract for the sale of goods, wares, and merchandise; that no part of the same was accepted or received by the supposed buyer, nor was any earnest money paid, nor any note or memorandum in writing made to bind the parties.

A reply ignored the alleged agency of defendant; averred that defendant had received and accepted the "said shares so sold, and promised to pay plaintiff for the same;" assumed that "the shares so sold do not constitute such a sale of goods, wares, and merchandise as was contemplated by the statute of frauds and perjuries," and contained no denial of the corporate character of the Missouri Lime Company.

In a voluminous mass of oral testimony presented by the bill of exceptions, the following items appear to constitute all that is material to the controversy. The plaintiff testified that in August, 1869, he purchased from defendant an interest of one-fourth in the Missouri Lime Company, at the price of $6,000 or $8,000, of which he paid, at the time, $2,000. That defendant gave him a written receipt, stating on what account the money was paid, and that the proper papers were to be thereafter made out. That plaintiff thereupon undertook to superintend the work of the company; but finding, in two or three months, that it did not pay, he expressed his dissatisfaction to defendant, who told him that, if he was dissatisfied with his purchase, all he had to do was "to just be quiet, say nothing about it, and go on with the work, and that he would pay me back my money, with 10 per cent. interest. I might consider it just as a loan." Plaintiff accordingly kept quiet, and went on with the work. No writing was drawn, nor money paid, nor was there any indication of the agreement or resale

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other than the conversation referred to. Defendant afterwards repeatedly promised plaintiff to pay him the $2,000 and interest as soon as he could get it. In the cross-examination, plaintiff said that he continued to consider himself a member of the company until he got his money. Plaintiff's son, testifying in his behalf, said that, in the spring of 1870—which was some months after the alleged resale to defendant by the plaintiff—defendant told the witness that "he was willing, as soon as they could raise the money," to buy the plaintiff's interest.

At the close of the plaintiff's testimony, the court, upon defendant's application, instructed the jury that, upon the evidence adduced, the plaintiff was not entitled to recover; "the contract proved being void under the statute of frauds."

In the very skillfully prepared argument of plaintiff's counsel we cannot find a single reason why this instruction should not have been given. Under the pleadings the plaintiff had no case unless he proved an actual, complete, and binding sale to the defendant. The reply virtually admits that the commodity sold, if anything, consisted of shares of stock in an incorporated company. That such shares are goods, wares, and merchandise, within the purview of the statute of frauds, has been held too long, without an authoritative adverse ruling, to admit of question now. Since that statute first became the law, no sale of anything which it reaches has ever been affected by mere words, with nothing more. There was, in this case, literally nothing else. The plaintiff delivered nothing to the defendant. He argues that it was impossible for him to deliver the interest or shares sold, because the defendant had them already in his possession. If this be true, it is because there was no delivery in the first sale from defendant to plaintiff. There was, then, no complete sale in that transaction, and the plaintiff had nothing to either sell or deliver in the second one. But this difficulty is escaped,

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while his argument is destroyed by the allegation, in the petition, that he had actual possession of the interest at and before his sale thereof to the defendant. He likens his non-delivery, moreover, to the case of a ship at sea, which may be effectually sold when delivery is impracticable. But he fails to observe that no such sale of a ship was ever recognized as valid without some note or memorandum in writing, or payment of earnest money—both of which elements were wanting in the present case.

There was no transfer of the shares upon the books of the company. *White, Exr.*, v. *Salisbury*, 33 Mo. 150. There was no change of dominion over the property, but, on the contrary, the plaintiff still considered himself a member of the corporation "until he got his money." There was no act of acceptance or of ownership by the defendant; nor was there, in short, anything whatever done or attempted, either to satisfy the statute of frauds, or to screen the alleged contract from its invalidating power.

But was there, in fact, any sale even attempted in the conversation between the parties? Their concurrence of views would appear to have been rather upon a rescission of the former agreement than upon the making of a new one. Not a word was said about a present sale. The only proposition considered was that the past transaction should be treated no longer as involving any transfer of property to the plaintiff, but that the money advanced by him should be regarded as a loan, to be repaid with interest. If the plaintiff, instead of suing for the purchase money upon an assumed sale, had framed his petition more nearly in accordance with his proofs, he would at least have escaped the difficulties which obstruct him in this proceeding.

No other matters of exception inviting our review, the judgment is affirmed, with the concurrence of all the judges.

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THE CITY OF ST. LOUIS, Respondent, *v.* DAVID F. KAIME, Appellant.

April 10, 1876.

1. When premises are occupied by a tenant, an agent of the owner cannot be proceeded against under a municipal ordinance for failing to remove a nuisance therefrom.
2. The tenant's possession and control of leased premises are inviolable by the landlord or his agent, except for purposes pertaining to the preservation of the freehold.
3. Power given by charter to the mayor and council of the city of St. Louis "to provide by ordinance for the abatement of nuisances and the preservation of the public health," will not sustain an ordinance made under color thereof, or authorize an interpretation of such an ordinance to an effect which would be in violation of the laws of the State.

APPEAL from St. Louis Court of Criminal Correction.

Reversed and dismissed.

Fisher & Rowell, for appellant, cited: Taylor's L. & T., secs. 174, 178, 345; Dill. on Mun. Corp. 253, 254, 259; Shaw *v.* Cummisky, 7 Pick. 76; Gibbons on Dil. and Nuis. 506; Whart. Cr. Law, secs. 2436, 2437; Hill. on Torts, 600; Pickard *v.* Collins, 23 Bos. 444; People *v.* Townsend, 3 Hill, 479.

T. J. Cornelius, for respondent, cited: Rev. City Charter, Art. 3, sec. 1; 1 Dill. on Mun. Corp. (2d ed.) 405, sec. 303; State *v.* Hays, 13 Mo. 246; State *v.* Canton, 43 Mo. 48.

LEWIS, J., delivered the opinion of the court.

Defendant was charged, in the St. Louis Police Court, with a violation of city ordinance No. 8982, relating to nuisances. He was found guilty and fined $20. An appeal to the Court of Criminal Correction resulted in a fine of $5.

The 1st section of the ordinance in question provides that: "Whoever shall create, commit, permit, or continue a nuisance of any kind, nature, or description in, upon, or about any private or public property within the limits of

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the city of St. Louis, * * * is hereby declared guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than $5 nor more than $500." The 2d section authorizes an entry by the police upon any premises for the purpose of examination, and "to direct the owner, agent, or occupant of the premises, by written notice, to forthwith remove, discontinue, or abate" any nuisance there found. It further declares that: "Whoever shall fail, neglect, or refuse to remove, discontinue, or abate a nuisance on premises of which he is the owner, agent, or occupant, within forty-eight hours after the service upon him of the notice mentioned, * * * shall be deemed guilty of a misdemeanor," etc.

The charge was made against defendant under the 2d section. By an agreed statement of facts it appears that, at the time of the alleged dereliction, defendant was agent for the owner of the premises described in the complaint, for the purpose of collecting the rents; that said premises were then in the occupancy of tenants, and that a nuisance, in the shape of a filthy cellar, was upon them; that the defendant was served with notice, according to the ordinance, but failed to remove the nuisance. Instructions to the general effect that, under such circumstances, the city could not recover, were asked for by the defendant and refused by the court.

The determination of a single question will dispose of all others presented on this record. Can a mere agent of the owner of the fee simple be held punishable, under the city ordinance, for failure to enter upon premises in the lawful possession of a tenant, in order to abate a nuisance within the tenant's exclusive control for the time being? The simple statement of the question seems to furnish its answer. When an owner lets to a tenant, he surrenders the entire possession and control for the term, having then no more right of entry than any stranger, unless for certain exceptional purposes affecting his future enjoyment of

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the freehold. Outside of such purposes, the tenant may resist his invasion of the premises as a violation of the law which protects the domicile against the world. The agent, of course, can have no greater right than the owner. This is the law of Missouri. If the ordinance, in language or effect, proposes to command a violation of this law, and to denounce penalties for a failure so to violate it, then the ordinance is so far a nullity. Such, however, appears to have been the practical interpretation applied to the ordinance in the courts below.

It would be more reasonable to adopt an interpretation which will leave the ordinance in force. The person having the actual occupancy or control of any premises is alone responsible for a private nuisance maintained thereon. If there be a tenant or occupant, he is the party to whom the penalty will attach if he fail to obey the notice and direction provided for by the municipal regulation. If there be no occupant, then the actual control is in the owner or his agent, or both, and to him or them the ordinance will apply. This interpretation will fully effectuate the intent of the municipal legislation, and is the only one capable of avoiding collision with the charter stipulation that city ordinances shall be "not inconsistent with any law of the State."

We need not discuss the proposition that this ordinance is valid, even in the interpretation claimed for the city, because the charter expressly gives power to the mayor and council to provide, by ordinance, for the abatement of nuisances and the preservation of the public health. This power is not exempted from the rule that even a lawful object must be accomplished in a lawful way. The objects of the ordinance may be unexceptionable; but, if the method of reaching them be unlawful, that method must be abandoned for one which is not so. All the judges concurring, the judgment is reversed and the cause dismissed.

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The St. Louis Railroad Company, Appellant, *v.* The Northwestern St. Louis Railway Company, Respondent.

April 25, 1876.

1. It appears that, under "An act to authorize the formation of railroad associations, and to regulate the same," approved December 13, 1855, it was competent to organize a street railway company in the city of St. Louis. But, in any event, such a company having been constituted under the forms prescribed in said act, an act of the General Assembly, approved January 16, 1860, recognizing the corporate organization, and defining its powers, etc., was effectual to place the existence of the corporation beyond question. Such an act was not "retrospective in operation."

2. Section 3 of an act of the General Assembly provides: "No street railway shall hereafter be constructed * * * nearer to a parallel road than the third parallel street from any road now constructed, or which may hereafter be constructed, except the roads hereinbefore mentioned." *Held,* that the true interpretation permits the construction of a railway nearer than the third parallel street from one of "the roads hereinbefore mentioned;" but forbids such construction within that distance from any other.

Appeal from St. Louis Circuit Court.

Affirmed.

Glover & Shepley, for appellant, cited: Emfield Toll Bridge Co. *v.* Hartford Toll Bridge Co., 17 Conn. 40; Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149; Pesquatequa Bridge Co. *v.* Bridge Co., 7 N. H. 35; Boston & Lowell R. R. Co. *v.* Salem & Lowell R. R. Co., 2 Gray, 1; Washington Bridge Co. *v.* The State, 18 Conn. 53; Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Binghampton Bridge Co., 3 Wall. 51; Home of the Friendless *v.* Rowse, 8 Wall. 438; Washington University *v.* Rowse, 8 Wall. 440; Dartmouth College *v.* Woodward, 4 Wheat. 518; Piqua Branch State Bank of Ohio *v.* Knoop, 16 How. 369; Dodge *v.* Wolsey, 18 How. 331; Jefferson Branch Bank *v.* Shelby, 1 Black, 436; Franklin Branch Bank *v.* Ohio, 1 Black, 474; Washington Bridge Co. *v.* The State, 18 Conn. 53.

Jacob Klein and *Hitchcock, Lubke & Player,* for respond-

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ent, cited: McCandle's Appeal, 70 Pa. St. 210, 214, 217; Ancient City Sportman's Club *v.* Miller, 7 Lans. 412; People *ex rel.* *v.* Nelson, 46 N. Y. 477; Session Acts 1858–9, p. 165, sec. 22, pp. 171, 443, sec. 3, p. 444; Cooley's Const. Lim. 191, 192, 195, 207, 281, 282, 283, 396; 1 Dill. on Mun. Corp., secs. 46, 55 (and note), 61, 296 (and note), 387; Illinois, etc., Canal Co. *v.* St. Louis, 2 Dill. 70; City of St. Louis *v.* Grone *et al.*, 46 Mo. 574; Booth *v.* Town of Woodbury, 32 Conn. 118; Webster *v.* Town of Harwinter, 32 Conn. 131; Leavenworth *v.* Norton, 1 Kan. 432; Kyle *v.* Malin, 8 Ind. 34; Hitchcock *v.* St. Louis, 49 Mo. 484; People's R. R. Co. *v.* Memphis R. R. Co., 10 Wall. 38, 50, 52, 53; Witham *v.* Sharp, 17 Barb. 435; 18 Barb. 228; 27 N. Y. 611; Davis *v.* Mayor, etc., 14 N. Y. 506; State *v.* Mayor, etc., 3 Duer, 119; Lackland *v.* North Missouri R. R. Co., 31 Mo. 180, 187; 1 Redf. on Rys. (5th ed.), secs. 258, 319, 320, 333; 2 Dill. on Mun. Corp., sec. 575; City *v.* Laughlin, 49 Mo. 559; Ruggles & Bigler *v.* Collier, 43 Mo. 353; San Francisco & Oakland R. R. Co. *v.* Oakland, 43 Cal. 502; Morris & Essex R. R. Co. *v.* City of Newark, 2 Stock. 352; Collins *v.* Hatch, 18 Ohio, 523; Rev. Stat. 1855, pp. 425, 1027; Sedgw. on Stat. and Const. Law (2d ed.), 141 (note), 143; People *v.* Law, 34 Barb. 494; Peterson *v.* Mayor, etc., 17 N. Y. 449, 454; Const. of Mo. 1820; Rev. Stat. 1855, p. 85, sec. 17; City *v.* Clemens, 52 Mo. 133; State *v.* Auditor, 33 Mo. 287; Hope Mutual Ins. Co. *v.* Flynn, 38 Mo. 483; Brutsang *v.* Wolf, 35 Mo. 174; McManning *v.* Farrar, 46 Mo. 376, 377; 1 Am. Law Reg. (N. S.) 193, 201, 205, 207; 2 Greenl. Cruise on R. Prop. 67; 3 Pars. on Con. (6th ed.), secs. 539, 541; West River Bridge Co. *v.* Dix, 6 How. 533; Matheny *et al.* *v.* Goldens, etc., 5 Ohio St. 375; Illinois & Michigan Canal *v.* Chicago & Rock Island R. R. Co., 14 Ill. 314; Mott *v.* Pennsylvania R. R. Co., 30 Penn. St. 9; Louisville City Ry. *v.* Louisville, 8 Bush, 415; City of St. Louis *v.* Manufacturers' Savings Bank, 49 Mo. 574; City

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of St. Louis *v.* Life Association of America, 53 Mo. 466; Commissioners *v.* Northern Liberties Gaslight Co., 12 Pa. St. 318; Frankford, etc., R. R. Co. *v.* Philadelphia, 58 Pa. St. 119; Commonwealth *v.* Pennsylvania Coal Co., 66 Pa. St. 41; Cooley's Const. Lim. (3d ed.), secs. 394, 395; West End & Atlanta St. R. R. Co. *v.* Atlanta R. R. Co., 49 Ga. 151; Chenango Bridge Co. *v.* Binghampton Bridge Co., 27 N. Y. 87, 102, 103; Rice *v.* R. R. Co., 1 Black, 358; Auburn & Cato Plank Road Co. *v.* Douglas, 9 N. Y. 444, 452; Louisville & Portland R. R. Co. *v.* Louisville City R. R. Co., 2 Duv. 175; Oakland R. R. Co. *v.* Oakland, Brooklyn, etc., R. R. Co., 45 Cal. 365, 378; Norwich Gaslight Co. *v.* Norwich City Gaslight Co., 25 Conn. 19; State *v.* Cincinnati Gaslight and Coke Co., 18 Ohio St. 262; Charles River Bridge Co. *v.* Warren Bridge Co., 11 Pet. 420; Tuckahoe Canal Co. *v.* Tuckahoe & James River R. R. Co., 11 Leigh, 42; Illinois & Michigan Canal Co. *v.* Chicago & Rock Island R. R. Co., 14 Ill. 314; Brooklyn City & Newton R. R. Co. *v.* Coney Island, etc., R. R. Co., 35 Barb. 364; 33 Barb. 358, 423; Sixth Avenue R. R. Co. *v.* Kerr, 45 Barb. 138; Jersey City & Bergen R. R. Co. *v.* Jersey City & Hoboken Horse R. R. Co., 20 N. J. Eq. 61; Metropolitan R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262, 269; Commonwealth *v.* Central Passenger R. R. Co., 52 Pa. St. 506, 518; Pike *v.* Megoun, 44 Mo. 491, 499; 1 Dill. on Mun. Corp., sec. 57; Cooley's Const. Lim. (2d ed.), secs. 67, 70; St. Louis Gaslight Co. *v.* City of St. Louis, 46 Mo. 121; State *v.* Binder, 38 Mo. 450; State *v.* Clarke, 54 Mo. 17.

Lewis, J., delivered the opinion of the court.

Plaintiff, claiming to be a corporation under the laws of Missouri, authorized to construct and operate a street railway in the city of St. Louis, alleges that, by an act of the General Assembly, approved January 16, 1860, certain exclusive privileges were bestowed upon it, the effect whereof was, and is, a prohibition against the construction of any

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street railroad parallel to plaintiff's, and nearer than the third parallel street therefrom; that defendant, at the filing of the petition, was about to construct a railway on a street parallel to that occupied by plaintiff, and next adjacent to it, for a distance of nine blocks, or about a half mile, to plaintiff's irreparable injury, etc. Plaintiff, therefore, prayed an injunction restraining and forbidding the construction of such parallel railway, and for general relief. The injunction was refused by the Circuit Court, whereupon plaintiff appealed.

Many questions are raised by defendant touching the plaintiff's corporate existence, the powers of the municipal government of St. Louis, the legislative authority to ratify void or voidable proceedings, the validity of retrospective legislation, and of grants of exclusive privileges. But, as our disposition of this cause will be controlled by an interpretation of the act of January 16, 1860, it seems unnecessary to do more than state briefly our conclusions on these questions, without extended discussion.

The plaintiff was organized in February, 1859, under "An act to authorize the formation of railroad associations, and to regulate the same," approved December 13, 1855, for the purpose of "constructing, maintaining, and operating a railroad for the conveyance of persons and property, to be worked by horse-power only, from Bellefontaine cemetery to the southern boundary of the city of St. Louis, over and along certain streets of said city." By city ordinance No. 4371, approved March 10, 1859, and by an amendatory ordinance, No. 4467, approved June 30, 1859, plaintiff was authorized to construct and operate its railroad from the northern boundary of the city, at its intersection with the Bellefontaine road, upon and over the following streets, to wit: "From said intersection southwardly along the line of and through said road and Broadway, with a double track, to O'Fallon; thence continuing southwardly, with a double track, down Fifth street to such street, between

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Market and Myrtle streets, as the said company might select; thence, with a single track, west on the street so selected to Seventh street; thence south on Seventh street, with a single track, to its junction with Carondelet avenue; thence, with a double track, to the then southern city limit; thence, returning, with a single track, from the said intersection of Carondelet avenue with Seventh street, northwardly along Carondelet avenue and Fifth street, till it strikes the double track of the said road on Fifth street." The first section of "An act concerning street railroads in the city of St. Louis," approved January 16, 1860, was as follows:

"Section 1. The St. Louis Railroad Company, the People's Railway Company, and the Citizens' Railway Company, as hereinbefore organized under the act to authorize the formation of railroad associations, and to regulate the same, approved December 13, 1855, are hereby ratified and confirmed in their respective rights under said law, and the roads now built or commenced, and the gauge of track established by said companies, is sanctioned; and said gauge of four feet ten inches is hereby recognized as the legal gauge of all other street railroads that may be built in the city and county of St. Louis. Said companies shall conform to, and be governed by, said law concerning railroad associations, except as follows: First, said companies shall not be required to carry freight; second, the report made to the city comptroller shall be in lieu of an annual report required to be made to the secretary of state by the law under which said companies organized."

These several acts and proceedings, defendant contends, were of no avail to establish the plaintiff's corporate existence. It is argued that the act of December 13, 1855, had exclusive reference to railroads operated by steam locomotives, between distant points of travel, and that, therefore, the attempted organization of a street railway company under its provisions was absolutely void. The city ordi-

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nances are held to have been *ultra vires* and void, because the municipal government could not create a corporation, by mere recognition or otherwise, nor could it grant exclusive privileges or rights of way, in the absence of express charter authority, for any such purpose. The act of January 16, 1860, it is claimed, does not help the matter, because, first, there is no legislative competency to ratify or effectuate that which is not merely voidable, but absolutely void; second, so far as the act undertakes such ratification, it is retrospective, and, therefore, unconstitutional; third, so far as it attempts a grant of the exclusive privileges claimed, it is void as amounting to a surrender of the right of eminent domain.

It is by no means certain that a street railway association could not have been properly organized under the act of December 13, 1855. The general authoritative provision is very comprehensive: "Section 1. Any number of persons, not less than six, may form a company for the purpose of constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property." By the 7th subdivision of the 29th section, every such company is authorized "to take and convey persons and property on their railroad, by the power or force of steam, or of animals," etc. Many special provisions of the act, it is true, may not be applicable to street railways, because, in their customary uses and methods of operation, no such regulations are required for them. Such, for example, are the provisions for condemnations of right of way. But the same might be said, as to this particular, of any railroad company which should procure all its right of way by purchase or donation, and so never have occasion to use the process of condemnation. Nothing is proved for defendant by this fact, if there yet remain in the act a sufficiency of provisions literally applicable to street railway associations to show that these are within its general purview. This, I think, might be easily proved, but it is unnecessary for the

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present purpose. In the opinion of Allison, J., quoted by defendant's counsel as reported in 3 *Legal Gazette*, 156, the reasoning is so utterly inapplicable to our statutory regulations that it throws no light on the question. A special point there made is upon the statutory difference between a "railroad" and a "railway." Our legislation nowhere recognizes any such distinction.

The city ordinances were ineffectual to confer on the plaintiff any original authority to construct or maintain its railway. That authority being once derived, in the form here claimed, from the General Assembly, the city might, under the general law, give or withhold its assent to the use of the particular streets which the company desired to appropriate. This power would naturally carry with it a right to impose conditions upon which only the assent would be given. In this view the chief objections urged by defendant against the ordinances under consideration disappear.

But all the questions thus far considered are, for the purposes of this case, effectually settled by the 1st section of the act of January 16, 1860, already quoted. We discover no force in defendant's objection that a legislative ratification of that which was void is itself a nullity. If the doctrine were applicable to the antecedent facts, it would yet be here superseded by the intrinsic force of the act itself, not as a ratification or confirmation, but as an original grant. It contains all the essential elements of a special act of incorporation. Each of the three bodies corporate is identified as the same, which, by the name set forth, was "heretofore organized under the act to authorize the formation of railroad associations, and to regulate the same, approved December 13, 1855." Its powers, privileges, and responsibilities are declared to be those defined in "said law concerning railroad associations," with certain specified exceptions and modifications. Whatever insufficiency may have existed previously, the plaintiff was

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unquestionably a corporate entity, in fact and in law, from and after the passage of that act. The constitutional prohibition against legislative acts of incorporation was not then in existence. Nor is the objection that the act was "retrospective in operation" any more substantial. Sedgwick's definition of a retrospective law, adopted by our Supreme Court in *City* v. *Clemens*, 52 Mo. 144, is: "A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed." We do not find in the record a single fact illustrating any such tendency in this law against the rights of the defendant or of the public. The plaintiff might have complained of it, on that ground, with much better reason. But that corporation, having fully accepted the act, can raise no voice against it.

But, whatever may be the plaintiff's right of access to the courts, as resulting from these conclusions, it cannot have the injunction asked for unless its interpretation of the 3d section of the act of January 16, 1860, is correct. We here find ourselves, with no little hesitation, constrained to attach to the language there used a meaning to which no allusion has been made by the counsel on either side, nor yet by the judge of the Circuit Court in the able written opinion delivered with his decision. The section is as follows:

"Sec. 3. No street railway shall hereafter be constructed in the city of St. Louis nearer to a parallel road than the third parallel street from any road now constructed, or which may hereafter be constructed, except the roads hereinbefore mentioned." [What here follows will be presently copied in another connection. The "roads hereinbefore mentioned" are those of the St. Louis Railroad Company, plaintiff in the present suit, the People's Railway Company, and the Citizens' Railway Company.]

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The language thus used brings into view two classes of roads or companies. Those in the first class are forbidden to construct their roads within a certain distance from the roads comprehended in the second class. Those in the second class are to enjoy the exemption thus secured from proximate competition. The "roads hereinbefore mentioned" are excepted from one of these classes. But from which? By all the laws of grammatical construction, the exception removes them from the second class, and not from the first. To this effect, language could hardly be more fitly chosen. Certain roads are not to be constructed within a specified distance "from any road now constructed, or which may be hereafter constructed, *except* the roads hereinbefore mentioned." If the exception had been inserted next after the words "no street railroad," or the words "city of St. Louis," the effect would have been very different.

It follows from this construction that the plaintiff, instead of being entitled to the exclusive privilege claimed, is expressly denied it by the very words of the statutory exception. We are aware that grammar is too often an unsafe guide to the meaning of a modern statute. But we must follow it, nevertheless, when it leads to no repugnance arising from the subject-matter or the manifest purposes of the law. In the present example we find no such repugnance.

The concluding provisions of the 3d section are as follows: "And, in consideration of the privileges herein granted, the city of St. Louis is hereby expressly empowered to impose and levy such tax and license upon said roads now constructed, or that may hereafter be constructed, as the common council of said city may determine to be just and proper; and the said city may make such municipal regulations concerning said street railroads as the public interest and convenience may require, except to reduce the

rate of fare charged by said companies, as now fixed by ordinance of the city of St. Louis."

It is argued for the plaintiff that these last provisions fix the interpretation of those in the beginning of the section. That the expression "privileges herein granted" has exclusive reference to what is contained in the section, and not in other parts of the statute. That the words "said roads" and "said companies" refer only to the three roads or companies named in the 1st section. That, consequently, the "privilege" of exemption from proximate competition, being the only one alluded to, is thus specially provided for those three companies, including the plaintiff. But this mode of interpretation involves too many departures from well-known rules to be adopted here. The word "herein" in a statute is universally applied to the whole enactment, unless expressly limited to some section or subdivision. But, even if limited to the section, in this instance, the reference to privileges is applied to "said roads now constructed, or which may hereafter be constructed," etc. This means that any road, with the exceptions mentioned, being once actually constructed—no matter at what time, present or future—shall thenceforth enjoy a freedom from competition in the form described. Further, the "said roads," upon which the tax and license are to be levied, are expressly the roads—any and all, not three, merely—"now constructed, or that may hereafter be constructed." The truth appears to be that, by reason of the exception interposed, the roads "hereinbefore mentioned" acquire no privileges whatever from the 3d section. But are they therefore exempt from the tax and license to be levied "in consideration of the privileges herein granted?" Not at all. By giving to the word "herein" its legitimate scope, as applying to the entire statute, we secure a harmony throughout. The 1st section is devoted to a bestowal of "privileges" on the first three roads "hereinbefore men-

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tioned." The 2d section confers certain privileges on the Missouri Railroad Company, and some also upon the Citizens' Railway Company; and the 3d section grants distinct privileges, as already seen, to every other road "now constructed, or hereafter to be constructed." Thus all are subjected to the tax, and to every one is tendered a consideration therefor. If it be desirable to strengthen this interpretation by exposing the absurdity of its opposite, this may be done by referring to the last clause in the 3d section. Surely it was never intended that the "said companies" to be protected against a lowering of their fares by the municipal government should be none but the plaintiff and the two or three others "hereinbefore mentioned."

The record shows that the plaintiff's road was "completed, or nearly so," when the act was passed. Why, then, should it be specially excepted from a general monition against roads to be "*hereafter* constructed in the city of St. Louis?" When, on the other hand, we treat the exception as attaching itself to certain of the roads "now constructed, or hereafter to be constructed," it becomes easy enough to bring the plaintiff within its meaning.

Looking at this 3d section in the light of its probable aims and purposes, we still find a propriety in excepting the roads specially mentioned out of the class for whose benefit the prohibitory clause was intended, rather than from those against which it was directed. The St. Louis Railroad traversed the city through its whole extent, lengthwise. The People's Railway occupied Fourth street and Chouteau avenue. The Citizens' Railway furnished transportation over the length of Franklin and Easton avenues. These lines lay along the grand arteries of intercommunication between distant parts of the city—defying comparison with any others in point of general importance to the public, and of continually increasing demands upon their carrying capacities. Lessons from the experience of other large cities had long since admonished intelligent legislators of the

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necessity of keeping open parallel lines of travel immediately adjacent to the great thoroughfares. Here was abundant reason why the streets running next to these roads should be held free for additional lines of railway; and hence "that the roads hereinbefore mentioned" should be debarred the benefits of a prohibition against approach, by possibly competing lines, nearer than the "third parallel street." But we can find no satisfactory reason why these particular companies should enjoy a permission to "hereafter construct" their roads in a proximity to others, which was to be denied those others with relation to them.

The learned judge below, adopting an interpretation the reverse of ours, considered the statute as exempting the plaintiff from the general prohibition against encroaching, in the form referred to, upon other lines; as if the reading were: "No street railroad, except the roads hereinbefore mentioned, shall hereafter be constructed," etc. The effect was, conversely, a protection in plaintiff's behalf against any such encroachment, if threatened by the defendant. But, as the general direction of plaintiff's road was from north to south, and that of defendant's from northwest to southeast—with a distance of only half a mile, or one-twentieth of plaintiff's roadway, over which the parallel track was to be laid—this was held to be not such a parallelism between the two railways as the statute intended to forbid. Our interpretation of the statute renders it unnecessary to pass upon this branch of the inquiry. We may say, however, that, no proofs having been furnished by the plaintiff of any competition likely to arise in fact over the half mile in question, the conclusions of the court upon this point would appear to be sustained upon the principle, *de minimis non curat lex*.

For aught that appears in this record the judgment below was right, and is, therefore, affirmed. All the judges concur.

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GEORGE HOWES, Respondent, v. HENRY HOLMES *et al.*, Appellants.

April 25, 1876.

1. A bill of exceptions signed after the close of the term in which the motion for new trial was overruled, without any stipulation or entry of record authorizing that proceeding, will not be noticed for any purpose.
2. An adjudication of bankruptcy will not compel a stay of proceedings, in a suit against a bankrupt in a State court, upon motion and production of the certificate of adjudication.

APPEAL from St. Louis Circuit Court.

Affirmed.

Slayback & Haeussler, for appellants, cited: Bayley on Bills, 37, sec. 15; Carter v. McClintock, 29 Mo. 464; Parsons' Merc. Law (1st ed.), 85, note 2; Woodford v. Darwin, 3 Vt. 82; Story on Part., secs. 140, 142, 147, 148; Wag. Stat. 1374, sec. 7; Snyder v. Raab, 40 Mo. 167.

Hitchcock, Lubke & Player, for respondent, cited: Wag. Stat. 851, sec. 23, p. 1043, sec. 28, p. 1374, sec. 7; Haggerty v. Morrison, 59 Mo. 324; Carpenter v. Turrell, 100 Mass. 450; Diepenbrock v. Shaw, 21 Mo. 122; Sutter v. Streit, 21 Mo. 159; Farrar v. Finney, 21 Mo. 569; Wilcoxson v. McBride, 23 Mo. 404; Ellis v. Andrews, 25 Mo. 327; Gale v. Foss, 47 Mo. 276.

LEWIS, J., delivered the opinion of the court.

The record shows that this cause was tried, and a final judgment rendered against defendants, at the October term, 1873. A motion for new trial was overruled during the December term, 1873. The bill of exceptions was presented and signed in the February term, 1874. No stipulation of the parties, or entry of any sort, shows that consent or permission was given for presenting a bill of exceptions after the close of the term in which the motion for new trial was overruled. This is conclusive against our authority

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to notice that paper for any purpose. *Smith* v. *Pollack*, 58 Mo. 161. No error is suggested in the record proper.

Defendants Holmes and Moody have presented certificates showing that they have been adjudged bankrupts by a court of competent jurisdiction, under the laws of the United States, and file motions for a stay of further proceedings in this court until they shall have obtained their respective discharges. We can find no reason for granting the applications. Nothing in the bankrupt law operates to oust this court of its jurisdiction already acquired, in the absence of a restraining order from the bankruptcy court. No such order appears; but, on the contrary, the plaintiff here produces an order from that authority, issued under the 21st section of the bankrupt law, expressly granting leave to proceed herein to final judgment. The motions are overruled, and the judgment of the Circuit Court is affirmed. All the judges concur.

JOHN REED *et al.*, Respondents, *v.* PEPER TOBACCO WAREHOUSE COMPANY, Appellant.

April 25, 1876.

1. An agreement whereby a corporation collecting the lawful fees due to certain officers is to retain part thereof, in consideration of forbearance of efforts to procure a repeal of the law by which the offices were created, is void.
2. If a corporation, collecting fees for tobacco inspectors, collect more than is allowed by law, and pay over the same, such over-payments cannot be set up as a counter-claim in a suit for fees collected and not paid over.
3. A counter-claim founded on *quantum meruit*, with a detailed account of items and separate charges, is not sustained by proof of a special contract fixing a lumping compensation for all the items together.

APPEAL from St. Louis Circuit Court.
Affirmed.

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A. M. Gardner, for appellant, cited: Wag. Stat. 726, sec. 30; 1 Pars. on Con. 19, 447; 1 Greenl. on Ev., secs. 10, 172; Dillon *v.* Chouteau, 7 Mo. 386; Armstrong *v.* Farrar, 8 Mo. 627; Hunt *v.* Robinson, 13 Mo. 82; Brown *v.* Lathrop, 4 Cow. 336; Barrock *v.* Austin, 21 Barb. 241; Howard *v.* Cobb, 3 Day, 309; Taylor *v.* Peck, 21 Gratt. 11; Tuttle *v.* Turner, 28 Tex. 759; Marks *v.* Bank of Missouri, 8 Mo. 316; Halsa *v.* Halsa, 8 Mo. 303; Mullanphy *v.* O'Reilly, 8 Mo. 675; 1 Pars. on Notes & Bills, 175; Frank *v.* Hough, 29 Ill. 145; Claflin *v.* McDonough, 33 Mo. 412; Lima Township *v.* Jenks, 20 Ind. 301; Miller *v.* Coates, 4 N. Y. (S. C.) 429; Knapp *v.* Hyde, 60 Barb. 80; Wolfe *v.* Marshall, 52 Mo. 167; 1 Story, secs. 491, 523, 524; Fisher *v.* Wilson, 18 Ind. 133; Shaw *v.* Barnhardt, 17 Ind. 183; Lewis *v.* McMillen, 41 Barb. 420; Wiggins *v.* Tudor, 23 Pick. 444; Brien *v.* Marquard, 17 Johns. 58.

Dryden & Dryden, Pope & McGinnis, for respondents, cited: Morris *v.* Barnes, Admr., 35 Mo. 415; Wag. Stat. 723, sec. 12; Claflin *v.* McDonough, 33 Mo. 412; Wolfe *v.* Marshall, 52 Mo. 167; Woodworth *v.* Burnett, 43 N. Y. 273; Merritt *v.* Milliard, 4 Keyes, 208; Holdemess *v.* Baker, 44 N. H. 414; Tennant *v.* Elliott, 1 B. & P. 3; Chitty on Con. (10th Am. ed.) 730; Daly *v.* Timon, 47 Mo. 516; Western Boatmen's Savings Assn. *v.* Kribben, 48 Mo. 37; Bishop *v.* Ransom, 39 Mo. 416; Long *v.* Towl, 41 Mo. 398; Morgner *v.* Kister, 42 Mo. 466; Hannibal & St. Jo. R. R. Co. *v.* Mahoney, 42 Mo. 467; Collins *v.* Saunders, 46 Mo. 389; Ancil *v.* Cape Girardeau, 48 Mo. 80.

LEWIS, J., delivered the opinion of the court.

Plaintiffs were tobacco inspectors from March 14, 1870, to March 25, 1871. Their official fees were, by arrangement, collected from the tobacco dealers by defendant, and paid over weekly. This suit was to recover a balance of $1,752.45, which, it was claimed, had been collected by

defendant, in excess of the sums accounted for to plaintiffs. The answer admitted the collection by defendant of inspection and auction fees on 11,683 hogsheads of tobacco, amounting to $8,762.25, of which it had paid over to plaintiffs the sum of $7,632. It alleged that the fees allowed by law to plaintiffs amounted really to only $7,301.87; so that plaintiffs had received more than they were entitled to by $330.13. Defendants denied any and all indebtedness to plaintiffs, and set up a counter-claim for a balance of $1,200 on an itemized account. Among the items were: charges for office rent; for weighing hogsheads; for commission on collections, at 10 cents per hogshead; for amount paid to plaintiffs on 1,436 boxes of tobacco at 22 1-2 cents each; for auction fees; and for excess in payments over the fees which plaintiffs were lawfully entitled to receive. Plaintiffs replied, putting in issue the new matter contained in the answer, and specifically denying each item of the counter-claim.

The cause was sent to a referee for trial of all the issues.

The referee found and reported the facts to be substantially as follows: That, under the provisions of law in force prior to March 2, 1871, the plaintiffs were entitled to a fee of 75 cents for each hogshead of tobacco inspected. That on that day a new law went into effect, reducing the number of inspectors from three to one, and the fee to 25 cents per hogshead; that, during the whole period from March 14, 1870, to March 26, 1871, the defendant collected from the tobacco dealers the inspectors' fees, at 75 cents per hogshead; that, for some time prior to March 14, 1870, the plaintiffs Reed and Judd had been receiving from defendant the sum of 60 cents on each hogshead, instead of the 75 cents allowed them by law; that an agreement to this effect had been entered into, "solely upon the consideration and for the reason that the defendant suggested and threatened that the law under which they held their offices would be repealed by defendant's procurement," unless said

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plaintiffs so agreed; that when plaintiff Mercadier became an inspector, on March 14, 1870, he positively refused his assent to the arrangement, although urged thereto by the same considerations which had influenced his co-inspectors, and "asserted and declared that, if he took said 60 cents, he should at some future time assert his claim to the balance due;" that defendant continued, nevertheless, to pay over to plaintiff, weekly, "upon the basis of 60 cents per hogshead inspected, and that, during all that time, the defendant collected from the owners of said tobacco, as inspection fees, the sum of 75 cents on each hogshead; that all of said tobacco was inspected at defendant's warehouse, and that the fees due plaintiffs were collected by defendant from the customers of said warehouse for the convenience of all parties concerned." Upon the items of the counter-claims, the referee found all the issues for the plaintiffs.

The conclusions of law reached by the referee were, in effect, (1) that the agreement between plaintiffs and defendant, for a deduction from the fees of the former, was illegal and void; (2) that, as to the alleged payments by defendant to plaintiffs of fees collected in excess of what the law allowed at the time—which was after March 2, 1871—the sums having been voluntarily paid to defendant by the dealers, the latter could not now recover them back; and the defendant, having received and paid them over as a mere intermediary for the benefit of plaintiffs, had no more right to demand their return for any purpose.

The referee found, therefore, and reported that there was due from the defendant to plaintiffs the sum of 15 cents for each hogshead inspected during the period mentioned; and recommended a judgment in plaintiffs' favor for the sum of $1,752.45, being the aggregate thereof, and interest from the commencement of the suit, making in all the sum of $1,965.17. Defendant filed exceptions to the report, which were overruled, and judgment was rendered accordingly, from which defendant appealed.

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Upon a careful examination of the voluminous testimony before the referee, we can find nothing to impeach the propriety of his findings. There were some contradictory statements of the different witnesses, principally about immaterial facts; but the preponderating evidence upon the material issues was decidedly on the plaintiffs' side. We are even hardly called upon to apply the rule which would forbid our weighing the testimony in a case where it simply tends to justify the finding by the referee. The argument of counsel here against his conclusions ignores many of the most striking points in the evidence by which they are sustained. It is insisted that the referee allowed defendant credit for only 60 cents paid to the plaintiffs as inspectors, when they in fact received 62 1-2 cents per hogshead. Yet the uncontradicted testimony throughout shows the extra 2 1-2 cents were for auction fees, going to a particular person, in which the inspectors had no interest. It appeared from the testimony that, as to the charge for office rent, it was distinctly declared by defendant's officers that nothing was to be charged therefor, under any circumstances; plaintiff's occupancy being an especial convenience to defendant and its customers. It was shown by defendant's testimony that, as a means of compelling plaintiff Mercadier to come into the arrangement for a confiscation of part of his lawful fees, an order was issued against the payment to plaintiffs of any part of the moneys collected for them, until they should unanimously concur in that arrangement. It appeared, also, that the law maintaining three inspectors was regarded by defendant's officers as an oppressive and unnecessary burden upon the tobacco merchants. That these officers, having it in their power, and feeling it a moral duty, to procure the abolition of the system, agreed, nevertheless, to permit its continuance only so long as their corporation might, under the arrangement with plaintiffs, share in the proceeds of the unfair exactions which the law imposed.

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The referee's conclusions of law were without fault—unless it lay in the omission of one which, as the case stood, would have been equally pertinent and destructive of the entire defense, even if the alleged agreement had not been vitiated by the want of a lawful consideration. The counter-claim was founded on a *quantum meruit*, a detailed account setting forth the amount separately due to each item of service; yet the only attempt to sustain it was by proof of a special contract, in which, as alleged, it had been agreed that a retention of 15 cents per hogshead out of defendant's collections should compensate all these services in a lump. This contract having been fully executed, as charged, was inadmissible to sustain the counter-claim as presented in defendant's answer. *Munford* v. *Wilson*, 19 Mo. 669.

The proceedings in the court below were without error, and the judgment is affirmed. All the judges concur.

THOMAS A. DRYDEN *et al.*, Respondents, *v.* SANFORD B. KELLOGG, Appellant. 2 87 / 61 439 / 2 87 / 90 81

April 25, 1876.

1. A sale and delivery of personal property in the vendor's possession implies a warranty of the title, in the absence of an express agreement to the contrary.
2. Buildings on leasehold property which, by the condition of the lease, may be removed by the lessee at the expiration of the term, may be sold and transferred as personalty. It is immaterial that the right of removal is conditioned upon the final fulfillment of the stipulations in the lease.
3. An undertaking by the assignee to pay the rents and taxes on leasehold property will constitute a sufficient consideration to uphold an assignment of the lease.
4. A purchaser of personal property is not required, before proceeding against his vendor upon the warranty of title, to wait for an actual deprivation by the true owner. He may surrender the property voluntarily, but must be then able to show conclusively that his surrender was to the paramount owner.
5. The measure of damages, upon breach of warranty of title, is the amount

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of the purchase money, with interest, to which may be added expenses necessarily incurred in defense of the failing title.

6. A liability upon breach of warranty is a "debt" within the meaning of the statute which provides for suits against stockholders, in the event of dissolution of a corporation.

7. A contract liability which may be sued upon at any time is not a "debt which is not to be paid within one year from the time the debt is contracted," within the meaning of the statute above mentioned.

8. The requirement that, in order to hold a stockholder liable, suit must be brought against the corporation within one year after the debt shall become due, has no application where the corporation has become bankrupt before the expiration of the year.

Appeal from St. Louis Circuit Court.

Affirmed.

Sanford B. Kellogg, *pro se*, cited: Erickson *v.* Nesmith, 4 Allen, 236; Andrews *v.* Callender, 13 Pick. 490.

Glover & Shepley, for respondents, cited: Kritzcas *v.* Woodson, 19 Mo. 327; Ochiltow *v.* Iowa R. R. Co., 54 Mo. 113; Cable *v.* McCune, 26 Mo. 371; Blair *v.* Rankin, 11 Mo. 440.

Dryden & Dryden, for respondents, cited: Dresser *v.* Ainsworth, 9 Barb. 619; Bell on Sales, 95, in 49 Law Lib. 50; 1 Washb. on Real Prop. (1st ed.) 2, sec. 4, book 1; Aldrich *v.* Parsons, 6 N. H. 555; Osgood *v.* Howard, 6 Greenl. (Me.) 452; Russell *v.* Richardson, 1 Fairf. 431–433; Wills *v.* Bannister, 4 Mass. 515; Doty *v.* Gorham, 5 Pick. 487; Ashnum *v.* Williams *et al.*, 8 Pick. 402; Vanness *v.* Packard, 2 Pet. 137; Hines *v.* Ament, 43 Mo. 300 (Bliss, J.); Bircher *v.* Parker, 43 Mo. 451; Bircher *v.* Parker, 40 Mo. 120; Sweetman *v.* Prince, 26 N. Y. 232, 233; Bust *v.* Dewey, 31 Barb. 543; Payne *v.* Rodden, 4 Bibb, 304; 2 Story on Sales, sec. 367; Funk *v.* Cresswell, 5 Clarke (Iowa), 88; Rawle on Cov. 250; Crittenden *v.* Posey, 1 Head, 311; Noel *v.* Wheatley, 30 Miss. 181; Arthur *v.* Moss, 1 Oreg. 193; Armstrong *v.* Percy, 5 Wend. 535; Dickson *v.* Desire's Admr., 23 Mo. 166; Tong *v.* Matthews, 23 Mo. 437; Foster *v.* McO'Blennis, 18 Mo. 91; 3 Bl. Com., side p. 154; 1 Wag. Stat. 180, par. xiv., sec. 1; 1 Bouv. L. Dic., title Debt; 1 Burr. L. Dic., title Debt; Com-

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monwealth *v.* Jailer, 4 Serg. & R. 506; Gray *v.* Bennett, 3 Metc. 526; State Savings Assn. *v.* Kellogg, 52 Mo. 583; Carver *v.* Braintree Mfg. Co., 2 Story, 432; Mill Dam and Foundry Co. *v.* Hovey, 21 Pick. 417; Haynes *v.* Brown, 36 N. H. 545; Gray *v.* Bennett, 3 Metc. 526; Provident Saving Inst. *v.* Jackson Place Skating and Bathing Rink, 52 Mo. 552, 557; Hawthorne *v.* Calef, 2 Wall. 10; Corning *v.* McCullough, 1 N. Y. 47; Morris *v.* Wrenshall, 34 Md. 492; Perry *v.* Turner, 55 Mo. 428.

LEWIS, J., delivered the opinion of the court.

On March 24, 1869, the Southwestern Freight and Cotton Press Company, a corporation created under the laws of Missouri, proposed in writing to sell to the plaintiffs one steam-engine and boiler, at the price of $1,500, and all the improvements then standing on certain lots at the intersection of Main and Plum streets, St. Louis, at the price of $2,000, all to be paid in cash; also, to transfer to plaintiffs, free of charge, an unexpired lease of the same lots, plaintiffs agreeing to pay all taxes on the property, and the annual rents thereafter to fall due. Plaintiffs accepted the offer, paid the money, and were duly put in possession of their purchase. The corporation gave them a receipt specifying the articles sold, with their prices, as above; the improvements consisting of two brick houses and one gravel-roof shed. The lease referred to bore date October 23, 1865, and was for a term of eleven years. It contained a stipulation by which the lessee might remove any improvements from the premises at the expiration of the term if the antecedent conditions of the lease were fully satisfied. The corporation delivered a written assignment of the lease, in which the expressed consideration was "for value received," and the plaintiffs gave their sealed obligation to comply with its terms.

Prior to these transactions, in May, 1868, the corporation had executed a deed of trust conveying the same property, leasehold and all, to John G. Scott and Daniel H. Donovan,

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as trustees, to secure the holders of certain bonds of the company. On June 10, 1869, the corporation was adjudicated a bankrupt, and, in due course, its effects were turned over to an assignee. On October 15, 1869, the trustees made sale of the property—being joined therein by the assignee of the bankrupt corporation—to satisfy the deed of trust. At this sale plaintiffs bought the engine and boiler for $225, and the rest of the property was struck off to another bidder. Plaintiffs thereupon surrendered their possession, delivering the keys to the assignee in bankruptcy. At the time of their original purchase, plaintiffs had no knowledge of any incumbrance on the property.

On May 16, 1873, this suit was instituted against the defendant, as a stockholder of the corporation to the amount of $4,000 par value. The petition set forth substantially the facts above recited, averring a warranty of title in the sale to plaintiffs by the corporation, and a breach thereof in the virtual eviction by the trustees' sale. Plaintiffs claimed that an indebtedness thereby accrued to them from the corporation of $3,500, and that defendant, by the dissolution of the latter, became liable, under the statute, to pay the same with interest *pro tanto* to the amount of his stock.

The answer took issue upon the material allegations in the petition, and generally upon any liability of defendant. It averred that "the said company was a corporation organized under the 69th chapter of the General Laws of the State of Missouri concerning manufacturing and business companies; that, by the provisions of said chapter, no liability attaches to any stockholder by reason of any such liability as is alleged in said petition; that the said alleged liability or indebtedness of the said company was not a debt contracted by the said company which was to be paid within one year from the time of the alleged contracting of the same." Defendant claimed a further exception in the fact that "no suit was brought by plaintiff against said company upon said alleged claim and demand against it within one

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year after the accruing of the said alleged demand;" and stated that, in a suit by another creditor of the company, he had already been compelled to pay, as stockholder, the sum of $3,455.95; so that his liability to these plaintiffs could not in any case exceed the sum of $544.05.

Plaintiffs in reply denied that their claim "was a debt which was not to be paid within one year from the time when it was contracted," within the meaning of the statute; assigned the company's bankruptcy as a reason for their not suing it within a year, and prayed judgment for the sum of $544.05, stated by defendant to be the limit of his possible liability.

The testimony tended, generally, to prove the plaintiffs' allegations. A verdict was rendered against defendant for $544.05.

Defendant saved an exception to the admission in evidence of an entry in the books of the corporation. But, as the ground of his objection was not stated, and we fail to perceive that the testimony was either irrelevant or incompetent, the point will not be further considered. The only questions proper for our examination were developed in the giving and refusing of instructions, and will be here discussed in order.

1. Was a warranty of title to the property implied in the sale by the Southwestern Freight and Cotton Press Company to the plaintiffs? If all the subjects of the sale were personalty, the question is sufficiently answered by that fact. Every sale and delivery of personal property in the vendor's possession includes a warranty of the title, in the absence of express agreement to the contrary. Defendant insists, however, that the buildings and improvements were a part of the realty incident to the leasehold, and, therefore, not personalty. But we do not so understand the case. The transaction was not a mere assignment of the lease, from which plaintiffs' acquisition of the improvements resulted as a collateral incident. The buildings were sev-

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erable, not only in fact, but by express recognition in the instrument whereby the leasehold was created. It is immaterial that the tenant's right of removal at the end of the term was conditioned upon a fulfillment of the stipulations in the lease. There resulted no authority to assume that the condition would be broken. Until that event, as even the lessor himself could not claim a forfeiture of the right of severance, it remained as a positive right for all the purposes of sale or transfer. Such a right to remove the improvements, of whatsoever character, upon leasehold premises, has uniformly demanded their legal treatment as personal property of the lessees. *Hines* v. *Ament*, 43 Mo. 300; *Bircher* v. *Parker*, 43 Mo. 443. This personal property was distinctly sold to plaintiffs for the consideration of $2,000. The assignment of the lease, although contemplated in the same agreement, was yet as much a separate transaction as any form of English words could make it. It had no concern with the consideration of $3,500 for the engine, boiler, and buildings. It was to be made "free of charge," other than plaintiffs' undertaking to pay the rents and taxes, which undertaking was sufficient to justify the expression "for value received."

We conclude that every element which the law requires to constitute an implied warranty of title in the sale of chattels was present on this occasion, as affecting, not merely the engine and boiler, but the building also.

2. Did a breach of warranty arise upon sale of the same property under the deed of trust, and a voluntary surrender, in consequence, by the plaintiffs, of their possession? In cases of personal property the rule is well settled that the warrantee need not incur the expense of fruitless resistance against the paramount owner. But, in proceeding against the warrantor, he must show conclusively that the title to which he has surrendered was better than his own. The plaintiffs fully obeyed this requirement here.

3. What was the measure of plaintiffs' damages for the

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breach of warranty, if any? As to the engine and boiler, it is substantially agreed that the court fixed this correctly at the sum which it cost the plaintiffs to get rid of the incumbrance, by purchasing again from the trustees. But, as to the buildings, defendant insists that plaintiffs could recover no more than they were worth as materials, upon removal. The rule is otherwise. While the vendor does not warrant against the loss of speculative profits, neither does he limit his warranty to any estimate which strangers might place upon the property for this or that purpose. He warrants that the vendee shall not lose the money actually invested. It follows that the measure of recovery, unless the intervening incumbrance be removed, is universally, as to either real or personal property, the amount of purchase money paid, with interest; to which may be added any expenses necessarily incurred in the defense of the failing title. The instructions given correctly applied the rule.

4. Upon the breach of warranty, if established, did a "debt," within the meaning of the statute, accrue against the corporation, which a stockholder might be held liable to pay? Section 22, on page 293, Wagner's Statutes, on which the plaintiffs rely, provides that, "if any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit." Defendant refers to the decision in *Cable* v. *McCune*, 26 Mo. 371, as showing that the liability here involved was not such a debt as the statute intends. In that case the statute required corporations to give notice annually of the amount of all their "existing debts;" failing which, the stockholders should be jointly and severally liable "for all the debts of the company," etc. The demand against the corporation was for damage sustained in the loss of a steamboat, through the negligence and misfeasance of its agents. The court held such a liability not to be a "debt" within the meaning of the law. That may

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be good authority against an application of the word "debt" to liabilities "substantially founded on tort;" but it furnishes no aid against such an application to the demand here being considered, where tort is out of the question. Some diversity of interpretations has followed the use of the word in different statutes, much depending on the strict construction proper for a penal, or the more liberal one for a remedial, statute. The strict definition of the term, adopted from Blackstone, is: "A sum of money due by certain and express agreement." Yet the same author, in treating of the implied original contract to submit to the rules of the community whereof we are members, says that "whatever the laws order any one to pay, that becomes instantly a *debt* which he hath beforehand contracted to discharge." 3 Bl. Com. 158. This may serve to show that in the analytical mind of the great writer the force of the word "debt" was confined, not so much to express, in contradistinction to implied, contracts, as to liabilities arising purely out of contract, and unmixed with any considerations of tort or malfeasance. By some authorities it seems to be considered that any cause of action which may be assigned, or which will survive for or against the legal representatives after death, is properly called a debt, in whatever connection referred to. In popular use the term has a much larger import, comprehending dues and liabilities of infinite variety. Comparing together all the sources of light on this question, and giving to the statute a strict construction, which will exclude the broad, popular signification suggested, we find no difficulty in applying the word and the statute to the plaintiffs' ground of action here, as clearly within the meaning intended by the law.

But defendant here claims that this proceeding is also controlled by section 13, page 336, Wagner's Statutes, which declares that "no stockholder shall be personally liable for the payment of any debt contracted by any com-

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pany formed under this chapter, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for such debt shall be brought against such company within one year after the debt shall become due." It is ingeniously argued that, by operation of the first provision, the liability can attach with reference to those debts only which by their terms are *required* to be paid within one year from the date of contract. The deduction is illogical. We are really led by the provision to contemplate two classes of debts: one of which are "not to be paid" —*i. e.*, the collection whereof cannot be enforced—within one year; the other embracing such as are not so postponed, but *may* be coercively collected within that period. The statute of frauds (Wag. Stat. 656, sec. 5) employs a similar form of expression: "No action shall be brought * * * upon any agreement that is not to be performed within one year from the making thereof, unless the agreement," etc., shall be in writing, and signed, etc.

In *Foster* v. *McO'Blenis*, 18 Mo. 88, it was held that this statute does not apply to contracts which *may* be performed within a year. The ruling is sustained by numerous authorities, and has long been recognized as the settled law. According to the defendant's method of interpretation, a promise to pay the plaintiff so much money "on the day of his marriage," or "on the arrival of a ship," would be void unless in writing, because not required to be performed within a year. Yet these are cases employed to illustrate the contrary operation of the statute. By unquestionable analogy, the plaintiffs' claim for breach of warranty, which was capable of being enforced at any time, cannot be classed as a debt which was "not to be paid within one year" from the time it was contracted.

The last objection to be noticed is that no suit upon the debt in question was brought against the corporation within one year after it became due. This is effectually disposed of by the decision in *State Savings Association* v. *Kellogg*,

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52 Mo. 583. It was there determined that the bankruptcy of the corporation will dispense with the necessity for such a suit, as a useless and frivolous measure which the law will not require. *Lex neminem cogit ad vana seu inutilia.* In the case before us the corporation was adjudicated a bankrupt some months before the breach of warranty occurred.

Finding no error in the record, we must affirm the judgment. Judge BAKEWELL concurs; Judge GANTT not sitting.

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STATE OF MISSOURI, *ex rel.* ANDREW T. KENNEDY, Respondent, *v.* UNION MERCHANTS' EXCHANGE OF THE CITY OF ST. LOUIS *et al.*, Appellants.

April 25, 1876.

1. An unreasonable by-law of a corporation is void.
2. A by-law will not be declared void for unreasonableness unless that conclusion is perfectly clear.
3. A by-law of the Union Merchants' Exchange which compels members to submit their business controversies to arbitration, on pain of suspension or expulsion, is unreasonable and void.
4. Neither would a legislative grant, in the charter, of permission to make such a by-law avail.

J. O. Broadhead and *Broadhead & Overall*, for appellants, cited: Bryan *v.* Pike Benevolent Society, 8 Watts & S. 247; B & W. S. Society *v.* Vandyke, 2 Whart. 309; Ang. & Ames on Corp. (6th ed.), secs. 415–418; *Ib.* (9th ed.), secs 415–418, 441–449, and notes; *Ex parte* Long, 29 Eng. Law & Eq. 194; Queen *v.* Evans, 3 El. & Bl. 362; Green's Brown's Ultra Vires, 44, 45, and notes; High on Rem. 206, sec. 292, p. 208, sec. 295, and note; Wag. Stat. 1037, sec. 22, ch. 110; Society of Visitation *v.* Commonwealth *ex rel.*, 52 Penn. 125; 23 Mo. 449; 27 Mo. 225; High on Rem. 211, secs. 301, 302, p. 212, sec. 302, and note.

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Marshall & Barclay, for respondent, cited: Jaccard *v.* Anderson, 32 Mo. 188; State *ex rel.* *v.* Everett, 52 Mo. 95; Stephen's Pl. 143; Harper *v.* Mayor of New York, 17 Wend. 199; People *ex rel.* *v.* Mayor of New York, 7 How. Pr. 81; Taylor *v.* Griswold, 2 Green L. 223; King *v.* Liverpool, 2 Burr. 731; King *v.* York, 5 Durnf. & E. 76; King *v.* Hereford, 6 Modern, 309; Ang. & Ames on Corp. (9th ed.), sec. 7; *Ib.*, secs. 410, 432; State *ex rel.* *v.* Chamber of Commerce, 20 Wis. 63; People *v.* Medical Society of Erie, 24 Barb. 570; Fawcett *v.* Charles, 13 Wend. 473; Commonwealth *v.* Guardians of Poor, 6 Serg. & R. 469; State *ex rel.* *v.* Georgia Medical Society, Am. Corp. Cases, 328; Evans *v.* Philadelphia Club, 50 Pa. St. 107–115; King *v.* Feversham, 8 T. R. 352–356; Farmers' Loan Co. *v.* Carroll, 5 Barb. 613–649; Toler *v.* Hayden, 18 Mo. 399; Walt *v.* Huse, 38 Mo. 210; Berch *v.* Schneider, 27 Mo. 101; McCloon *v.* Beattie, 46 Mo. 391; King *v.* Doncaster, 2 Burr. 738; People *v.* St. Francis Society, 24 How. Pr. 218; Carter *v.* Sanderson, 5 Bing. 79; Scriveners' Co. *v.* Brooking, 2 Gal. & Dav. 419; Dunham *v.* Rochester, 5 Cow. 462; Kennebec R. R. Co. *v.* Kendall, 31 Me. 470; Cartan *v.* Father Matthew Society, 3 Daly, 20; Perry on Tr. (1st ed.), secs. 411–491; State *v.* Burkhardt, 59 Mo. 75; State *v.* Lafayette County, 41 Mo. 545; Commonwealth *v.* St. P. Society, 2 Binn. 441,

BAKEWELL, J., delivered the opinion of the court.

This is a proceeding by *mandamus* to compel the appellants to reinstate the relator as a member of the Union Merchants' Exchange of St. Louis.

It appears that relator is a general provision and commission merchant of St. Louis; that defendant, the Union Merchants' Exchange, is an incorporated institution, of which the other defendants are directors; that the Exchange numbers amongst its members one thousand merchants and business men of St. Louis, and occupies commodious rooms in which these merchants daily meet to trade, and where,

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at the common cost of the members, and for their exclusive benefit, they daily receive trade reports from the chief commercial centers of the world; that this Exchange is the business mart of St. Louis, and owns valuable personal property, in which all the members have a vested interest; that relator became a member of said Exchange on July 18, 1871, and has, up to the time of alleged wrong complained of by him, remained so; and that, on July 17, 1874, he was suspended from membership by the directors, and has since that date been denied access to the floor of the Exchange, and deprived of all the benefits of membership.

These facts are set up in the petition, and are not denied in the return to the writ. An alternative writ was issued; and, in their second amended return to this writ, the appellants set up that, prior to their incorporation, the Union Merchants' Exchange had long existed as an association of merchants of St. Louis, with rules, regulations, and by-laws to which members were required to assent; that, by its charter, it has power to make such rules and regulations as may be proper and needful, and possesses all other general powers incident to corporations, and not inconsistent with the laws of Missouri and of the United States; that, by said charter, the existing rules, regulations, and by-laws are declared the rules of the corporation until regularly repealed or changed; that the by-laws and regulations now in existence were legally enacted in accordance with the charter, and were in force when plaintiff's relator was admitted as a member; and that he applied to be admitted subject to the existing rules and by-laws, of which he had full knowledge, and was admitted subject to those rules; and that he has, knowingly and deliberately, violated these rules, and been lawfully suspended, in accordance with the by-laws, for this violation of the laws of the association; that he has, by the by-laws, a legal right to apply to be reinstated in his rights as a member, and has neglected to do so. This is a

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mere outline of the substantial features of the return to the writ. It is not necessary, for the purposes of this opinion, to set it out in detail, nor to refer to any technical objections made to it in the demurrer filed by the relator of plaintiff. The demurrer was sustained, and a peremptory writ ordered; and, a motion for a new trial and rehearing having been overruled, the cause is brought before us by appeal.

The by-laws of the Union Merchants' Exchange are set out in full in the return; and the offense committed by relator, for which he was suspended, was a refusal to comply with an award of arbitrators, to which he had, in accordance with the by-laws, agreed in writing to submit.

If the by-laws violated were not reasonable, they cannot be enforced. If, then, this point must be decided against the appellant, it will not be necessary to consider the many other questions presented for our consideration in the very carefully prepared briefs submitted by the counsel on either side.

The by-laws in question are rule 6, section 7, beginning "and any member" to "suspension," down to and including section 11. Then sections 15, 17, 18, 19, and 20.

The law is not opposed to arbitration. On the contrary, it is said to be the policy of the law to encourage these domestic tribunals, although they may, if they choose, disregard the rules of law in their decisions. Indeed, it is probably the very fact that they are not bound by legal rules, nor by the principles of that equity which follows the law, more than anything else, that has led the courts to say that arbitration is looked upon with favor. This was first said when the law as to the introduction of evidence excluded as witnesses, not only the parties themselves, but every person having an interest, though remote, in the matter in controversy; so that it must have been felt that, in many cases, justice was promoted by a submission to a tribunal which could get at facts that the courts could not regard. In

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many cases the rules of law and the inflexible principles of equity, which cannot be made to bend to meet the hardship of each particular case, must necessarily work injury and wrong to individuals, and, when *summum jus* is *summa injuria*, it is well enough that the parties should agree to resort to a tribunal which will do a rude and untaught justice between man and man, in consonance with all the facts and surroundings of a particular case. But though the law encourages this reference to a tribunal of the choice of the parties, which relieves the courts of a burden and the public of a heavy expense, and which sometimes can do, and does, a right that the courts cannot, it will not have persons coerced into waiving their strict rights if they choose to insist upon them. Every citizen has a right to the protection of the equal laws, and to all the security against irremediable injustice which the wisdom of centuries has provided in those traditional rules or legislative enactments that govern proceedings in courts of justice. Is it not, then, a fatal objection to the by-laws of the Union Merchants' Exchange, on the subject of arbitration, that they compel every respectable merchant of the city, on the pain of losing caste and being deprived of means essential to the carrying on of business on equal terms, to submit every controversy arising in the course of trade to a tribunal which is not bound by legal rules, and which may, if it so choose, utterly disregard, in forming its decision, every ruling of the courts and every legislative enactment?

To set aside a by-law there must be no equipoise of opinion in the matter; its unreasonableness should be demonstrably shown.

Against an erroneous decision of arbitrators there is no remedy whatever. It is settled, both in England and in this country, that the reasonableness or unreasonableness of an award does not affect its validity, so that there be no misbehavior or corruption in the arbitrators. Though property which the law of distribution clearly gives to five

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be distributed to two, if it only appear that the arbitrators intended to disregard the law, the courts cannot relieve. *Ainsley* v. *Goff*, Kyd, 354. The greatest chancellors have uniformly held as a binding rule that the only ground to impeach an award was corruption or gross misbehavior of the arbitrators, such as refusing to hear the witnesses on one side, or taking evidence with notice only to one party, or gross mistake—as to which the rule is so vague as to be no protection whatever. The question was early examined in this country, and the rule laid down by Chancellor Kent, in *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 339, has been generally adopted throughout the United States, and is the law in Missouri. Where it is sought to vacate an award, under our statutes, it is not sufficient to show that the arbitrators erred in judgment either as to law or fact; partiality or corruption must be shown. 13 Mo. 104; 28 Mo. 346; 27 Mo. 275; 37 Mo. 445.

By-laws prohibiting the members of a municipal corporation from pursuing their legal remedies beyond the jurisdiction of the corporation are void, since no power less than that of the legislature can deprive the subject or citizen of his right to legal redress. *Player* v. *Archer*, 1 Sid. 121; *Ballard* v. *Bennett*, 2 Burr. 778.

Middleton's case (Dyer, 332, *b*) was in the sixteenth year of Queen Elizabeth, and it is this: Middleton, a citizen and haberdasher of London, sued one Osborne, another citizen and lately his journeyman, in debt on bond, and was condemned; for which suit, and because he would not stand to the arbitrament and order of one Sir Lionel Ducket and Sir Rowland Howard, knights aldermen of said city, Middleton was disfranchised; upon which he sued for remedy in the Queen's Bench, to be restored to his freedom again. He was restored. A by-law in total restraint of one's right is bad. Com. Dig. 309. Neither would a legislative grant, in the charter, of permission to make such by-laws avail A by-law made in pursuance of an

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express power to make such laws, if contrary to the common law or to a legal enactment, is void. Every by-law must be reasonable and lawful. 8 Pick. 96; *Dunham* v. *Rochester*, 5 Cow. 462; Com. Dig., by-law B.

In view of the character and objects of this corporation, and the manifest inconvenience to which every trader must necessarily be subject who is not permitted to join, or is expelled from, the chief mart of commerce in the place of which he is a citizen and a trader, we think a by-law compelling the members of the Union Merchants' Exchange to submit their controversies to arbitration, on pain of suspension or expulsion, is unreasonable, in the legal and technical sense of that term, and that it cannot be sustained.

We are, therefore, of opinion that the Circuit Court committed no error in sustaining the demurrer to the return in this case.

The judgment of the Circuit Court is affirmed. The other judges concur.

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STATE OF MISSOURI, to use of CENTRAL SAVINGS BANK, Appellant, *v.* HERBERT BELL *et al.*, Respondents.

April 25, 1876.

A conveyance of personal property, whether absolute or otherwise in form, and whether recorded or not, may be a good mortgage, as between the parties; but, as to creditors of the grantor, if the instrument be on its face absolute, with nothing indicating an intent to create a mortgage, there must be a change of possession within the terms of the statute to make it effectual for any purpose.

APPEAL from St. Louis Circuit Court.

Affirmed.

Farish & Griffin, for appellant, cited: Plumber *v.* Guthrie, 76 Pa. St. 455; Turner *v.* Kerr, 44 Mo. 429; Brant *v.* Robertson, 16 Mo. 129; Sharkey *v.* Sharkey, 47 Mo. 543;

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Holmes *v.* Farish, 9 Mo. 201; Davis *v.* Clay, 2 Mo. 161; DesLoge *v.* Ranger, 7 Mo. 327; Tibeau *v.* Tibeau, 22 Mo. 77; Wag. Stat. 281, sec. 10.

Doan & Levin, for respondent.

LEWIS, J., delivered the opinion of the court.

Defendant Bell sued one William Freudeman by attachment, which was levied on certain personal property. Plaintiff's usee made claim to the property, whereupon defendant, giving bond under the statute, caused it to be sold. Plaintiff seeks in this suit to recover upon the bond.

At the trial plaintiff introduced in evidence a bill of sale from Freudeman, absolute on its face, conveying the property to the cashier of the Central Savings Bank, for the consideration of $1,000. Also, testimony tending to prove that the transaction was, in fact, intended by the parties to be a mortgage, to secure a loan of $1,000, with the interest, for which Freudeman, at the same time, gave his note. There was no delivery of the property or change of possession, but the bill of sale was acknowledged and duly recorded some time prior to the issuing of the attachment. Plaintiff prayed the court to declare the law as follows:

"If the court finds from the evidence that the instrument of writing offered in evidence herein, although on its face a bill of sale of personalty, was intended between the parties thereto to be, and was, in effect, an equitable mortgage; and further finds from the evidence that the same was acknowledged and recorded in the county in which the mortgagee or grantor resided at the time of the execution of the same, then the court declares the law to be that the non-delivery of the goods described in said instrument is not of itself fraudulent and void, as against the creditors of the vendee."

The court refused so to declare the law, and rendered judgment for the defendant; from which the plaintiff appealed.

The question whether an instrument, appearing on its

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face as an absolute transfer, may yet, as between the parties, be treated by the courts as a mortgage, upon a proper showing *aliunde*, is no longer open for discussion. But, when such treatment is to affect the rights of the grantor's creditors, a different question is presented. So far as the parties themselves are concerned, the instrument, whether absolute in form or otherwise, need not be recorded at all. Nothing of effect will be added, or even preserved, by that process, whether the property be delivered or not. As affecting the rights of creditors, however, the law demands that an absolute sale of personalty be accompanied by a change of possession; while a mortgage of such property will be valid without such change of possession, if the instrument of transfer be duly recorded. The object of the law, in either case, is to secure to the creditor a certain degree of information—whose form will vary with the form of the transfer—that the property of his debtor has passed into other hands. But, where there is no delivery of the property, if the mortgage character of the instrument do not appear upon its face, and is known only as a matter of private understanding between the parties, how will the creditor acquire the information which the law exacts in his behalf? If the sale be absolute, he learns nothing of it from the record; because, to effect such a sale, something else is requisite, which the record cannot impart. If it be a mortgage, he is still left in ignorance, because the record does not show that fact. It appears, therefore, clearly necessary, in every such case, that the instrument contain something indicating an intention of the parties to create a mortgage, or else the mere fact of recording will not render it effectual against a creditor of the grantor. Wag. Stat. 281, secs. 8, 10.

The Circuit Court, therefore, did not err in refusing the instruction asked for. No other point being presented for our examination, the judgment is affirmed. Judge GANTT concurs; Judge BAKEWELL, of counsel below, not sitting.

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AUGUST LEISSE *et al.*, Appellants, *v.* ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY, Respondent.

April 25, 1876.

1. The right of eminent domain resides in the State, and may be enforced, not only in behalf of the State, but of any artificial person clothed with a franchise the enjoyment of which promotes a public use.
2. The basis of the enforcement of the right of eminent domain is the necessity for the public use of the property the taking of which is sought.
3. If proceedings are instituted to condemn for public use the property of an individual, and, after the value of the property is ascertained by inquest, the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings will be answerable to the owner for all damages occasioned by them.
4. Where property against which proceedings to condemn for public use belonged to A and B, co-tenants, who, in resisting the proceedings, employed different counsel, who severally attended to the management of the cause, *held*, that it was error to permit them to sue jointly to recover damages for counsel fees, etc.
5. In an action to recover damages for the institution of proceedings to condemn private property for public use, money need not have been actually paid out to entitle plaintiff to recover; but, if a debt has been created by reason of such proceedings, a damage has been incurred for which an action will lie.

APPEAL from St. Louis Circuit Court.

General term affirmed and cause remanded.

E. T. Farish and *F. & E. L. Gottschalk*, for appellants, cited: North Missouri R. R. Co. *v.* Lackland, 25 Mo. 533; North Missouri R. R. Co. *v.* Reynal, 25 Mo. 534; Hill *v.* Gibbs, 5 Hill, 58; Stevenson *v.* Cofferin, 20 N. Y. 151; Add. on Torts, 67; Twist *v.* Benton, 15 Mo. 619; St. Joseph *v.* Hamilton *et al.*, 43 Mo. 282; Rogers *v.* Hug, 44 Mo. 116; Dill. on Mun. Corp., sec. 474; Laughlin *v.* Municipality, etc., 5 La. An. 504; State *v.* Grover, 19 Md. 375; 31 Pa. St. 19; Graff *v.* Mayor of Baltimore, 10 Md. 554.

Thoroughman & Warren, for respondent, cited: Sedgw. on Dam. (6th ed.) 125; 1 Redf. on Rys. 245, ch. 11, p. 277, *et seq.*

GANTT, P. J., delivered the opinion of the court.

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The St. Louis & Iron Mountain Railroad Company, on July 23, 1872, commenced proceedings to condemn the land of appellants, for the purposes of the railroad. Its proceeding was by petition, which alleged that it had become necessary, and the public convenience required, that a branch should be built along said road in the city of St. Louis, from the corner of Convent and Main streets to the northwest corner of block 73, being the intersection of the east line of Fourth street with the south line of Chouteau avenue; and that for this purpose it was necessary for the railroad to acquire the property of the present plaintiffs, Leisse and Lange.

In this proceeding, either by condemnation or purchase, the railroad acquired all the property necessary for the proposed line east of Third street. As respects the property of Leisse and Lange, an award was made by the commissioners appointed by the court, to which the railroad excepted, and the court set the same aside and ordered a new appraisement to be made by a jury. Thereupon the railroad dismissed or discontinued the proceedings commenced to procure the land the acquisition of which by it had been alleged to be necessary for the public use. This was done December 19, 1873.

Thereupon Leisse and Lange, proprietors of the land thus indicated as necessary for the public use, brought their action to the April term, 1874, against the railroad company, to recover damages by them sustained by reason of the proceedings for condemnation. The elements of these damages were that, prior to the institution of the proceedings, the railroad company had given out that it proposed to, and would, locate its road over and across the lot of Leisse and Lange; that, in consequence of this announcement, they were unable "for years to lease, improve, or in any manner use and employ" their land; that they were themselves compelled to lease and rent other property; that, during the pendency of this suit, the said land was virtually condemned, idle, useless, subject to the payment of taxes

by Leisse and Lange, and to the loss of interest on the money therein invested; that, by said proceedings, it was rendered unsalable; that the appellants were put to much trouble, expense, and annoyance by said proceedings; were obliged to fee counsel for about eighteen months, at great cost, and for all this they claimed $10,000 damages.

To this petition a demurrer was filed, assigning as reasons therefor that the plaintiff did not state facts sufficient to constitute a cause of action, and that the petition did not charge defendant with the doing of any unlawful thing or the omission of any duty.

The Circuit Court, in special term, overruled this demurrer. Defendant declined to plead further, and there was an inquiry of damages, after which, due exceptions being saved, the case was taken by appeal to the general term, where the judgment of the special term was reversed.

At the inquiry much evidence was given of the particulars of damage, and the court laid down the following rules for the guidance of the jury:

"The jury are instructed that, in assessing plaintiffs' damages, they may take into consideration, as elements of damage, the rental value of the property from 23d July, 1872, till 19th December, 1873, and the loss, if any, to plaintiffs of rent of said premises during that period, caused by virtue of the proceedings mentioned in the petition; also, the loss of time of plaintiffs necessarily employed in attending court, and giving attention to said proceedings mentioned in the petition; and, also, the expense of counsel or attorneys employed in defending said proceedings."

The railroad company excepted to this instruction, and asked the following, which the court refused, against defendant's exception:

"The court instructs the jury that the evidence shows that the plaintiffs have not paid anything for services of their attorneys in defense of the condemnation proceedings complained of, and that, therefore, in assessing damages in

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this case, the jury are not warranted in allowing plaintiffs, on the score of attorneys' fees, more than nominal damages—that is, not exceeding one dollar.

"The complaint of the plaintiffs is for a joint or common injury to them, and the jury are, therefore, directed that, as to any damages sought on account of the several obligations of the plaintiffs for several attorneys' fees, and on account of time spent by the plaintiffs severally in and about the defense of the condemnation proceedings, the plaintiffs cannot recover in this cause, and as to such several injuries the jury are not warranted in taking the same into consideration in making their assessment of damages.

"The court instructs the jury that there is no evidence before them to show that the plaintiffs sustained any actual damage by reason of the institution and prosecution of the proceedings complained of, and that it is the duty of the jury, therefore, to assess nominal damages only to the plaintiffs, or a sum not exceeding one dollar."

There was evidence at the inquest as to the value of counsel fees. It appeared that Leisse had employed one firm and Lange another. These two charged $500 each. The fees had not been paid, but were charged against Leisse and Lange, and they owed them respectively.

Lange testified that the lot was ninety-five feet on Third street by 147 feet on Chouteau avenue, and was held by him and Leisse as co-tenants. Lange was a banker, Leisse was a lumber merchant. The lot was bought in 1869. It was vacant in 1872. The proceedings made the property almost unsalable. The court excluded all evidence of the threats of the railroad company to take the land prior to the actual commencement of proceedings, and the witness went on to say that their commencement hindered the improvement and use of the property, and that when the proceedings were dismissed, in September, 1873, the value of the property was less than it was in July, 1872. It was unsalable in December, 1873. It was in demand in July, 1873, and

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before that time. The annual taxes were about $210. Lange estimated his own time to be worth $1,000. The rental (annual) value of the property was from 6 to 8 per cent. of its money value in fee.

Leisse gave similar evidence. The points made for a reversal of the judgment of the general term are:

1. That the petition disclosed a cause of action.

2. That the rule of estimating damages indicated by the Circuit Court at special term was correct.

1. The question presented by the demurrer to the petition is important and interesting. The right of eminent domain is a transcendent right. It is indispensable to the administration of government; for sometimes the legitimate operations of government may be embarrassed by unreasonable and perverse refusal of individuals to part, on fair terms, with property imperatively needed for public use, and the power to compel such individuals to give up their property, on receiving its fair equivalent, must reside somewhere, or there is danger of an absolute interruption of measures essential to the common weal. So much is undeniable; but, while the existence and use of this right are admitted to be inherent in the very nature of government, it is not to be doubted that there has been so much oppression and spoliation perpetrated by the abuse of it as to bring the power itself into serious disfavor with unreflecting men.

It is a very trite observation that necessity knows no law, and that its existence is a justification for that to which it compels individuals and society; but, while this is admitted, the warning is forcibly conveyed to both to be above all things careful to see that necessity, and not some pretense of necessity, actually exists. Our statute books are disfigured by charters conferring upon corporations, which it is difficult to regard as of public utility, this sovereign right of taking private property for a use alleged to be public. Until a recent change in the organic law, courts were not at liberty to go behind the legislative declaration that a use was

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public, and inquire whether it really deserved to be so called. Under such a system of laws abuses were natural, and almost inevitable. But it appears to be unheard of under that system for a corporation to be allowed to say that the same thing was necessary or unnecessary, according to the condition of the real estate market. When a piece of property is designated as being in the necessary track of a line of railroad, and proceedings are commenced to condemn it for public use because of its necessity for the promotion of that use, the railroad company (we speak of the law as it stood before 1875) is the sole judge of the necessity, and, if it be content to pay the price which a jury may assess as the value of the property, the owner is compellable to surrender it. It seems wholly inadmissible that the railroad company should be at liberty to declare that a particular piece of property, or a particular series of lots or tracts of land, will be taken as necessary for the location, change, or modification of its line of road; to arrest wholly, by this declaration, any improvement and beneficial occupation of the lots in question; to ruin their market value temporarily at least, perhaps permanently, except with reference to the projected use (all other uses being rendered impossible), and, after an interval more or less protracted, to abandon the proposed line; to say, with all gravity, that the alleged necessity was a loose form of expression, signifying, at most, that it might be convenient to have the property if the price was sufficiently depressed, but that it was not of so pressing a nature as to prevent the present discontinuance of proceedings to acquire the land, the tendency of the price of real estate being downward, and the natural operation of such discontinuance being to depress its value in the particular locality; and that for all this the land-owner should be without recourse on the corporation.

For, let us suppose that six or more lots, which we will call A, B, C, D, E, and F, etc., constitute, in the order indicated. a tract of land sufficient to accommodate a line

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or branch line of a projected existing railroad. By the hypothesis the whole of these lots will be necessary to the establishment of the proposed line or branch line, and proceedings are commenced to procure the condemnation of them. A and F are furthest apart, and the others occupy the space between them. To make our meaning clearer and our illustration more pointed, let us suppose that, either by private arrangement or by the proceedings for condemnation, the corporation has acquired all the lots except C and D. Obviously there was no sincerity in the suggestion of the necessity of getting *all* these lots, or, sooner or later, *all* must be had by the road, and, moreover, *all* must be had before the line can be operated at all. This is plain. If the railroad company, after getting the title to all the other lots (A, B, E, and F), can discontinue proceedings as to the other lots, C and D, the owner of them is effectually paralyzed. If he puts any improvement on them, he will be liable to lose it; for, by the hypothesis, he does this in the face of a distinct warning that the land, without any improvement, is imperatively needed for supplying a public want. If he offers it for rent, or attempts to use it for such purposes as do not require the erection of permanent improvements (as, for instance, a lumber-yard, which seems to have been the contemplated use of the lots spoken of in this record), he will be liable, as soon as his lumber is carefully piled—a work of no little labor and expense—to be summoned to remove it at his own cost, because of the recommencement of the proceedings to procure a condemnation of the property Nothing prevents such a recommencement. Every one can see what enormous opportunities are thus given for annoyance and injury to the property-holder; and if we are told that for the actual infliction of this annoyance and injury the law gives no redress, but that the corporation may continue to play this wasting game indefinitely, until the property-holder is completely worn out, we will consider carefully the grounds on

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which this extraordinary privilege of mischief is claimed, before giving it the sanction of our approval.

It is not a pleasant reflection that the exercise of the right, in whose name these practices are attempted, is far more carefully guarded in Great Britain than in Missouri. The protection of the right of the individual in the enjoyment of his property, against the encroachments, either of the government itself or any corporation to which Parliament may assign—or, to speak more accurately, in whose favor Parliament may exercise the right of eminent domain—is much more complete in the United Kingdom of Great Britain and Ireland than in the United States of America. The admission may not be flattering to our national pride, but the fact must be borne in mind when seeking aid from the decisions made on this subject in the mother country. We shall, otherwise, be in danger of being misled into the adoption of conclusions flowing from premises quite different from those which form the basis of our reasoning here.

The general rule in Great Britain is that, when a railroad is projected, not only are the *termini* fixed, but also the line of the intermediate route, before Parliament is called on to decide whether the establishment of such a road will fulfill a purpose of public utility. If this question is decided affirmatively, the proceedings by which are divested the rights of those land-holders with whom the corporation can make no private agreement are conducted before a committee of Parliament, and, being once commenced, they can be no more discontinued by the company than the contestants or proponents, in the Circuit Court, of a will which has been admitted to probate or rejected by the Probate Court, can, at their own pleasure, put an end to the steps instituted for the purpose of making proof of the instrument in solemn form. *Benoist* et al. v. *Murrin* et al., 48 Mo. 48. This rule appears far more logical than that which obtains in Missouri. It seems to be law, here, that such proceedings may be discontinued, at any stage, by the

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corporation. *North Missouri Railroad* v. *Lackland*, 25 Mo. 515. But the decision in this case asserts an important qualification of the right to discontinue. Not only does it depend on a change of route, but, when exercised for this cause, certain consequences are regarded as attaching to the corporation. "It is obvious," says Judge Napton, delivering the well-considered judgment of the Supreme Court, in the case, cited, p. 584, "that, if the company is permitted to discontinue, all the costs and expenses of the land-owner should be paid by the company. This will embrace all the costs of the case, and counsel fees, both here and in the court where the case was tried."

It does not appear, by the report of the case just cited, whether any damages were claimable by reason of the compelled disuse of the land which the railroad company sought to condemn. If it was agricultural land, the utmost probable loss to the owner from this cause was that of one year's cultivation; and the fact that the condemnation of the field, or of a line through a field, for a railway track was threatened would not prevent the field being cultivated in the usual mode, up to the time when it was necessary to break ground for the construction of the road. The attention of the court, in the case in 25 Mo., does not seem to have been drawn to the point made by the appellants in the case before us. Had it been, we can hardly doubt that it would have been declared that compensation should be made to the land-owner for all costs, expenses, and *damages* occasioned by the proceeding. We think that such a conclusion is irresistibly implied in the language actually employed by the Supreme Court, and we accept that decision as a guide, in the sense indicated by Lord Mansfield when he said: "The reason and principle of a decision make the law; *not the letter of particular precedents.*"

We, therefore, think that the actual losses inflicted on the land-owner, by the institution and maintenance of the proceedings to condemn his land, are recoverable when

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those proceedings are discontinued; and that in the estimate of these losses will be included any loss of rent occasioned by the pending of the proceedings, and the threat of subjecting the property to the use of the road. So long as this threat continues, it is an injury and hindrance to the owner. If the railroad company intends condemning the land at all, it should proceed without delay. If it has abandoned the design, it should say so in an unequivocal manner, and at once.

2. One of the instructions asked by defendant, and refused by the Circuit Court at special term, was that plaintiffs were not shown to have sustained any actual damage by the institution and prosecution of the condemnation proceedings; and one of the grounds assigned in support of the demurrer to the petition was that it did not appear that the railroad company had done anything unlawful. These two matters may be considered together, for they are somewhat dependent the one upon the other.

That the railroad company was guilty of no illegality is not clear to us. It may be admitted that it had the right to appropriate the land of the plaintiffs, for the purpose of making its road, under certain conditions. One of these, of course, was that of paying for it. The other was that the appropriation was necessary to attain the object for which the charter of the road was granted. The term "necessary" has, indeed, been interpreted with what we think laxity by the highest judicial authority with which we are acquainted. In the case of *McCulloch* v. *State of Maryland*, 4 Wheat. 316, the question was whether a national bank was a "*necessary* and proper" agent in the collection, keeping, and disbursement of the public revenue. The counsel for the State of Maryland attempted to confine the term to its etymological meaning, and it is undeniable that this seems to be the natural and true sense of the word. When we say that A is necessary to the existence of B, we mean that, without A, B cannot exist; and, to demonstrate

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that B can have an independent existence, will prove that A was *not* necessary. To use a phrase of familiar use, A can be said to be necessary to B only when A is to B a "*conditio sine quâ non.*" But judges whom no lawyer names but to praise, and whose names themselves suggest eulogy, without a dissenting voice, after an argument in which Daniel Webster, Walter Jones, William Wirt, Luther Martin, and William Pinkney had participated, gave a different signification to the word, and held it to indicate such means as might seem to Congress to be "useful, convenient, or essential." All our reverence for Marshall, Story, and Washington is insufficient to make us accept their reasoning or their conclusions on this subject. If ever men could be justified in surrendering their own reason (except on subjects where authority is supreme), they would be pardonable for deferring to the opinions of such sages. But we gravely mistake if, on the occasion instanced, their reasoning was not unsound, and its consequence deplorably mischievous. That it was wanting in logical severity is well illustrated by the four words we have quoted from it, where, by the disjunctive conjunction, "convenient" and "essential" are used as terms of equivalent or convertible import. Without pursuing the distasteful task of criticising this celebrated opinion, we content ourselves with saying that we give an altogether stricter interpretation to the word "necessary;" and, following the reasoning of our own Supreme Court, already cited (25 Mo.), we reach the conclusion that nothing can be said to be necessary to the accomplishment of an object which can be dispensed with without abandoning the object itself.

Now, we are not told that the railroad company has abandoned the design in aid of which it attempted the condemnation of plaintiffs' property, and it is uncontradicted that it has acquired a considerable part of the land over which its new track was intended to pass, but has stopped short of acquiring the rest, which belongs to plaintiffs.

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It seems to us that one of the following propositions must be true, viz.:

(1.) The whole design originally contemplated has been abandoned, and so none of the land named in the condemnation proceedings is now necessary to the railroad company; or,

(2.) The original design is still cherished, but the acquisition of plaintiffs' property is not, and never was, necessary to its accomplishment; or,

(3.) The original design is still cherished, and plaintiffs' land is necessary to its accomplishment, but the temporary discontinuance of the proceedings is a tactical operation likely to lead to the acquisition of the title of plaintiffs' property on easier terms, at some early day—the value of the land for all other purposes being greatly impaired by the imminence of its appropriation for the use of the railroad.

We can think of no other hypothesis.

The first supposition seems opposed to all the facts before us; and, if it were admissible, it would follow that there was no necessity, in any proper sense, for the establishment of the new branch line.

If the second supposition be the true explanation, it results, of course, that the appropriation of plaintiffs' land was not necessary in the first instance; and, in respect of the third, it is enough to say that the railroad company could not be heard if it attempted such a definition of its action.

But the conclusion is that the land of plaintiffs was confessedly or demonstrably *not* necessary for the railroad; and, if so, it has no justification, under the law, for the steps which have caused such loss to the plaintiffs. Hence it cannot be said that the corporation has done nothing beyond what the law permitted it to do. It would be more precise to say that, under cover of lawful right, it has attempted something which the law sanctions only in a case the existence of which, by its own conduct, it has precluded itself from asserting.

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3. The respondent asked the court to declare that the plaintiffs could not, in this action (that is, suing jointly), recover damages for liabilities incurred by the separate retainer of counsel by each of them in defense of the condemnation proceedings, or for their several loss of time in attending to the business of that defense.

The evidence was uncontradicted that one of the plaintiffs retained Messrs. Gottschalk, and the other Messrs. Bakewell & Farish. These retainers were separate and independent. There were no joint retainers, and no joint responsibility in respect of professional services rendered. The time and attention bestowed by each plaintiff on the defense of the suit were also in no sense joint. It is hard to imagine any such thing as sameness of time and attention. The plaintiffs are not partners, nor is there any community between them, except in respect to the ownership of the land. That they were entitled to equal compensation for loss of time, etc., or for liability for counsel fees, is unlikely; but, if true, would be to no purpose. The rule is that, for all injuries to the realty, or all claims for occupation of the realty, tenants in common must join. *Lane* v. *Dobyns*, 11 Mo. 105, which established a doctrine contrary to that asserted in Chitty on Pleading, 75, 76, where it was laid down that "tenants in common *may join or sever* in such actions." And, hence, it was not only permissible, but necessary, that plaintiffs should sue jointly for the loss of rent occasioned by the condemnation proceedings. But they must sue separately for their several and unconnected claims for counsel fees and loss of time. This instruction should have been given, and, for its refusal, the decision of the court at special term was properly reversed at general term. It is possible that this was the only error which the Circuit Court, at general term, intended to instance. It is quite consistent with the record before us that such was their view.

4. Another instruction asked by the railroad company,

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that the plaintiffs could only recover nominal damages in respect of counsel fees incurred but not paid, was properly refused at the inquest. The plaintiffs are liable for these fees, and in any event are compellable to pay them. There is no analogy between the case before us and that of a covenantee who sues his covenantor for breach of a covenant against incumbrances. It is quite possible, until covenantee has paid these, that he may never be made to pay them; and he is under no original liability to pay them. He would merely discharge them to protect his land, and there may be reasons why he would elect not to do this.

The judgment of the general term, reversing the judgment of the special term, is affirmed, and the cause is remanded for further proceedings in conformity with this opinion. Judge LEWIS concurs; Judge BAKEWELL, having been of counsel, does not sit in this case.

HORACE W. POCOCKE, Respondent, *v.* AUGUSTUS W. POCOCKE, Respondent, and CHARLES H. BAILEY, Executor, Appellant.

April 25, 1876.

After sale of land in a proceeding in partition, and the distribution of the cash payment therefor, a creditor of one of the parceners, having obtained judgment against him before a justice of the peace before the sale in partition, filed a transcript of the judgment in the office of the clerk of the Circuit Court, and asked the court to order payment of this judgment out of the share of the parcener in the proceeds of sale, and to give him the benefit of a lien thereon as of the day when the transcript was so filed. *Held*, that the creditor was entitled to the order asked for.

APPEAL from St. Louis Circuit Court.

Reversed and final judgment.

T. A. & H. M. Post, for appellant, cited: Westervelt *v.* Haff, 2 Sandf. Ch. 103; Murray *v.* Ballou, 1. Johns. Ch. 566; Baird *v.* Corwin, 17 Pa. St. 462; Stern *v.* Epstin, 14

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Rich. on Eq. 5; Gradlebaugh *v.* Pritchett, 8 Ohio St. 650; Church *v.* Church, 3 Sandf. Ch. 437, 438; Loomis *v.* Riley, 24 Ill. 310; Rabb *v.* Aiken, 2 McCord Ch. 125; Wag. Stat. 839, secs. 13, 14; Id. 840, sec. 3; Youngman *v.* Elmira R. R. Co., 65 Pa. St. 287; Partridge *v.* Luce, 36 Me. 16; Steel *v.* Taylor, 1 Minn. 278; Johnson *v.* Payne, 1 Hill, 113; Codevise *v.* Gelston, 10 Johns. 520–522; Garvin *v.* Garvin, 1 Rich. (N. S.) 55, 62; Simmons *v.* Simmons, Harp. Eq. 256; Averill *v.* Loncks, 6 Barb. 478; Sweet *v.* Jacocks, 6 Paige, 362; De La Vergne *v.* Everton, 1 Paige, 183; Spray *v.* Rodman, 43 Ind. 228, 229.

M. Kinealy, for respondent, cited: Reinhardt *v.* Wendeck, 40 Mo. 579; Wag. Stat. 1034, sec. 6, p. 1050, sec. 9; Papin *v.* Blumenthal, 41 Mo. 439; Harwood *v.* Kirby, 1 Paige, 469; Lewis *v.* Atkinson, 15 Iowa, 361; Sebring *v.* Mesereau, 9 Cow. 344; Swartz *v.* Dryden, 25 Mo. 574; Wag. Stat. 972; secs. 41, 42, 53; Penn. Gerard *v.* Farmers' Bank, 77 Pa. St. 388; 2 Yeates, 324–329; Garvin *v.* Garvin, 1 Rich. 55; Cradlebaugh *v.* Pritchett, 7 Ohio, 651; Finlay *v.* Babin, 12 La. An. 236; Dunlop's Law of Penn. 562, sec. 49; Rabb *v.* Aiken, 2 McCord Ch. 124, 125; Carlton *v.* Felder 6 Rich. on Eq. 60; Swan's Rev. Stat. of Ohio, 592, secs. 9, 10, p. 680, sec. 444; Averill *v.* Loncks, 6 Barb. 478; Purdy *v.* Doyle, 1 Paige, 558; De La Vergne *v.* Everton, 1 Paige, 183.

GANTT, P. J., delivered the opinion of the court.

Horace Pococke filed his petition to the April term, 1871, of the St. Louis Circuit Court, stating that William H. Pococke, in his life-time, was seized of certain real estate in St. Louis, which was described in the petition; that he died intestate in 1852, leaving surviving him his children, Augusta M. Pococke, Henry C. Pococke, Horace W. Pococke, Leander R. Pococke, Laura V. Pococke, wife of John D. Elliott, and Caroline M. Pococke; that Leander R. died, leaving a will whereby he devised to Horace W. Pococke, Laura D. Elliott, Caroline M. Pococke, and the

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children of Henry C. Pococke all his real estate; that thereby plaintiff is entitled to five twenty-fourths of all said real estate, Augusta M. Pococke to four twenty-fourths, Henry C. Pococke to four twenty-fourths, Laura D. Elliott to five twenty-fourths, Caroline M. Pococke to five twenty-fourths, and the children of Henry C. Pococke to one twenty-fourth thereof; that the property is not susceptible of divisions in kind, and asking for a sale.

Henry C. Pococke was appointed guardian *ad litem* for his children, all of whom were minors, on April 13, 1871, and on February 27, 1872, Michael Kineally was appointed their guardian *ad litem*. Next day he filed an answer for them. At the February term, 1873, an order appears, under date of March 31, 1873, setting forth that it appears from the sheriff's report of March 29, 1873, that a tract of land described in the decree made in this cause November 27, 1872, was struck off to a purchaser who refused to comply with the terms of sale, and that the rest of the property was withdrawn from the sale, and, therefore, it was ordered that the sheriff "do now proceed to sell said real estate described in said decree, according to law," on the following terms, to wit, one-third cash, the balance in two equal annual payments, bearing interest at 6 per cent. per annum, and secured by deed of trust.

On May 29, 1873, the sheriff filed his report, setting forth that he had sold the property, and had in his hands, in cash and notes, upwards of $10,000 as the proceeds thereof; and, on June 7, 1873, this report was confirmed.

On April 17, 1874, Charles L. Bailey, executor of William S. Davis, filed his petition, setting forth that, on November 27, 1872, the court rendered a decree in partition according to the prayer of the petition; that Henry C. Pococke was entitled to four twenty-fourths of the proceeds of the sale; that he received this proportion of the cash payment, and that there was due to him $590.27 out of the second payment, which he had attempted to assign in writing to one

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Frederick E. Zelle; that, on April 13, 1873, Charles H. Bailey, as executor of Davis, got judgment against Henry C. Pococke, before a justice of the peace, for $120 and costs, and, prior to the sale, filed a transcript of the record of the case in the office of the clerk of the Circuit Court; that said judgment became a lien on Henry C. Pococke's share, and he asked the court to make an order of payment accordingly. This motion the court, on May 30, 1874, overruled. Bailey filed a motion for a rehearing on June 22, 1874, which being overruled, he presented a bill of exceptions, which was allowed. The court, at general term, affirmed this judgment, and this appeal is taken to reverse it.

1. The decree of November 27, 1872, does not appear in this record, but an order of sale was subsequently made, and it appears not to be disputed that there were in the hands of the sheriff, when this petition was filed by Bailey, credits belonging to Henry C. Pococke, or his assignee, to an amount more than sufficient to satisfy the judgment in question. Hence we need only inquire whether Zelle, the assignee of those credits, "at some time between May 24, 1873, and January 1, 1874," or Bailey, executor of Davis, the judgment creditor, is entitled to the fund. The sale was made on May 24, 1873.

The appellant says that "the first material circumstance in chronological order was the decree in the partition suit," and this, he thinks, was made on November 27, 1872. It is a singular fact that this decree does not appear by the transcript. It is, however, alluded to, and the date above suggested is assigned to it by way of recital.

The claim of Bailey was, if anything, a right to have his judgment satisfied out of the fund in court. It was not a right to any specific thing or sum, but a lien on a fund or a thing for the satisfaction of his judgment.

When the transcript of the record of the justice was filed in the Circuit Court, the land in which the judgment debtor had an interest had not been sold. Before execution

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could have been issued on the transcript, the land was sold under the decree or order of sale. It is immaterial whether this be considered as made in November, 1872, or March, 1873. The deed made by the sheriff was a bar "against all persons interested in the premises who were parties to the proceedings, and against all other persons claiming from such parties. Wag. Stat. 1872, sec. 34, p. 971. The transcript operated a lien on Henry C. Pococke's interest in the land from the day of its filing. Wag. Stat. 1872, sec. 42, p. 795. The lien on the undivided interest of H. C. Pococke would, in case partition in kind had been made, have attached to the share set off to him. *Lee* v. *Lindell*, 22 Mo. 202; *Harwood* v. *Kirby*, 1 Paige, 469. As our statute passes the title to the land to the purchaser who bid it off on May 24, 1873, a wrong would be done to the judgment creditor if the lien which, up to that sale, he had on the land, did not attach to the fund into which the land was converted. It is manifestly just that this transfer should be made of the lien from the one to the other, and to require the judgment creditor to issue execution would be to increase cost needlessly. The object of an execution is to convert the land into money, out of which the sum for which execution is issued may be satisfied. This conversion had already been made by sale, under the order looking to partition, before execution could issue under the judgment. The lien attached to the interest of Henry C. Pococke in the proceeds of the sale, and, we think, the Circuit Court should have ordered the judgment to be satisfied out of this share in those proceeds. We can perceive no possible objection to such an order, and by it alone can very plain rights escape defeat. The rights of Zelle, assignee, certainly did not commence until after May 24, 1873—most probably not until after June 7, 1873, and perhaps not until January 1, 1874. The rights of Bailey, executor of Davis, date from April 13, 1873. We think, therefore, that the judgment of the Circuit Court should be reversed, and

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final judgment given in this court for the satisfaction of the judgment of Bailey, executor of Davis, out of the interest in the proceeds of the sale which, on April 13, 1873, belonged to Henry C. Pococke. All the judges concur.

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ST. LOUIS DOMICILE AND SAVINGS LOAN ASSOCIATION, Respondent, *v.* EDWARD AUGUSTIN, Appellant.

April 25, 1876.

1. Where a committee of a corporation are authorized, by a resolution of the directors, to make collections due the corporation, they may institute proceedings to collect, in the name of the corporation, against an individual, without an order specifying the mode of collecting that particular indebtedness, or without any more particular authority with reference thereto.
2. Neglect to choose officers of a private moneyed corporation does not work a dissolution of the corporation. The acts of the officers holding over are valid.
3. In an action on a penal bond, judgment may be entered for the amount of the bond, with interest from the date of suit.
4. Where a corporation is, by its charter, authorized to make an usurious contract, and where no instruction as to usury was asked or given the jury, and where usury was not pleaded, a verdict will not be disturbed because the evidence discloses usury.
5. An entry of judgment on the assessment of damages by a jury in a suit upon a penal bond, which is not in the proper form for such a judgment, cannot be amended by a subsequent entry of judgment, the court taking the cause as then submitted, without having made any order whatever regarding the first entry; and on appeal both judgments will be set aside for irregularity.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Gottschalk and *H. D. Wood*, for appellant, cited: Forest City United Land and Building Assn. *v.* Gallager *et al.*, 25 Ohio St. 208; Mercer *v.* Conc. B. & S. Assn., 25 Ohio St. 187.

Slayback & Haeussler, for respondent, cited: Wag.

Stat. 293, 783, sec. 5; Kansas City Hotel Co. *v.* Harris, 51 Mo. 464; Rutherford *v.* Williams, 42 Mo. 18; Smith *v.* Best, 42 Mo. 185; DeKalb *v.* Hixon, 44 Mo. 341; Packman *v.* Meatt, 49 Mo. 348.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on a bond in the penal sum of $3,400, executed by defendant on April 15, 1858.

Plaintiff is a corporation created by the Legislature of this State in 1857. Its object, as declared in the act, is "accumulation of a fund, by small monthly installments, to enable the members of the association to purchase real estate, erect buildings, redeem mortgages, satisfy ground rents, and effect similar purposes." Each stockholder is to pay $1 monthly on each share of stock, until the value of the whole stock is sufficient to divide to each share $200. For neglect to make such payments, 10 cents monthly is to be paid on each share.

Each stockholder is entitled to a loan of $200 for each share he holds, the loan to be disposed of to the highest bidder, not to be made under par, the premium offered for the loan to be deducted when the loan is made. The loan must be secured by bond, mortgage, or deed of trust, and one share of stock for each $200 to be assigned as collateral, interest to be paid monthly, at agreed rates, not to exceed 1 per cent. per month.

The officers of the association are declared to be a president, vice-president, and secretary and treasurer, and eight directors, who may enact by-laws for their own government. The charter also provides that the president, treasurer, and directors shall constitute the board of directors, and shall be elected at the regular annual meeting.

It appears from this statement that certain provisions which, when existing in the shape of a constitution and by-laws, in similar institutions, have been held by the courts of Pennsylvania, Tennessee, and, perhaps, of other States,

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to be unlawful, are, in the case of this corporation, made a part of the charter itself, and directly sanctioned by the legislative power.

Defendant, at the time of the transaction set forth in the petition, was a director, as well as a stockholder, of plaintiff.

It appears from the pleadings and evidence that he borrowed $3,400, on April 15, 1858, from plaintiff, bidding 40 per cent. for the loan, and getting it over others who competed. After deducting the premium, $1,360, he, therefore, received but $2,040. Defendant was then the owner of twenty-three shares of stock. The loan was made on seventeen of these shares, which he then assigned to plaintiff as collateral, and executed the bond sued on, securing its payments by a deed of trust upon certain real estate in the city, which seems to have been a sink-hole of little value, and which was a source of expense, not only for taxes, but to comply with orders of the board of health.

Appellant paid his dues till August, 1860. On May 15, 1861, he assigned to the plaintiff the six shares on which he had obtained no loan, and received a credit of $308.15 for them upon the books of the association, to which he was indebted, at the date of the payment, $302.50. After that date he wholly ceased to make any payments. His shares were forfeited, and the deed of trust foreclosed by order of the board of directors, by a sale which took place on April 5, 1852. The net proceeds of this sale were $126.11. The property was purchased at the sale by plaintiff.

Nothing further was done in the matter on either side until 1866, when plaintiff, having expended $1,005 on the real estate for taxes and charges, a portion of which were a lien when it bought the land in at the sale under the deed of trust, and being unwilling to spend any more money upon the lot, sold it, at the instance of defendant, for $1,100, to his brother-in-law, Nischuitz, who owned the adjoining piece of ground.

In July, 1867, a meeting of stockholders of plaintiff was

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held, at which time it was resolved that the loan committee should collect, and divide amongst the stockholders, the assets of the association, the shares of stock having reached $200. The loan committee consisted then of the president, secretary, and treasurer. The secretary, who was much urged by stockholders to take action in making this collection, saw the president and treasurer in regard to the matter just before suit was commenced, and was then directed to commence the suit in the name of the corporation, although there was no formal meeting of the committee as such, and no formal resolution or entry in regard to the matter in the minute-book, or otherwise. The petition in the cause was filed on May 18, 1871. On the trial, defendant swore that, at the time that plaintiff, at defendant's instance, conveyed the lot mentioned to Nischuitz for $1,100, it released defendant from all further liability on his bond. But, in this he is directly contradicted by the officers of the company, with whom he says the transaction was had, and no circumstances appear which corroborate the view which he seems now to take of what passed between them at that time.

The jury found a verdict for plaintiff in the sum of $3,400, with interest from commencement of the suit, upon which judgment was entered for $3,400, the penalty of the bond sued on, with interest from the commencement of the suit, amounting to $306, making in the aggregate the sum of $3,706 for its damages, "together with costs." A motion for a new trial, and in arrest of judgment, were at once filed. These motions were taken under advisement, and, at the next term, the plaintiff entered a *remittitur* of $1,397.68.

The motions were then overruled, and judgment then and there entered anew for plaintiff, in the following form:

"Now at this day the plaintiff, by attorney, freely remits the sum of one thousand three hundred and ninety-seven dollars and sixty-eight cents, part and parcel of the judgment heretofore entered in this cause, on 19th November,

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1872, and the cause having been submitted to the court upon the pleadings herein and the proofs, the court doth find the issues for the plaintiff, and that the damages herein amount to the residue of said original judgment. It is, therefore, considered by the court that the plaintiff recover of the defendant the sum of three thousand four hundred dollars, the penalty of the bond sued on in this cause, and, also, its costs and charges herein expended, and have execution for the sum of $2,308.32, and costs aforesaid."

To the overruling of these motions, and the entry of this judgment, defendant excepted, and the cause is brought here by appeal.

1. It is contended by appellant that, because the board of directors never expressly, by resolution, authorized the commencement of this suit, and, inasmuch as the charter of respondent provides (sec 17) that "if monthly dues and interest be suffered to remain unpaid more than three months, the directors may compel payment of the principal and interest, ordering proceedings on the bond and mortgage according to law," therefore this suit was commenced without proper authority, and should be dismissed. We do not think so.

The loan committee appears to have been authorized to collect all outstanding amounts due the corporation, and could, undoubtedly, use the name of the corporation in any suits necessarily commenced to effect this object. The suit was commenced by direction of this committee. A consent of a majority of the board of directors was not necessary under the circumstances of this case.

Nor do we agree with counsel for defendant in thinking that this corporation is shown to have been dissolved, or that there were no officers competent to act. The acts of the officers of a corporation irregularly elected are valid until judgment of ouster. Neglect to choose officers at the proper time does not necessarily work dissolution of a private moneyed corporation, and where the charter provides for

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annual elections, the better opinion is that the old corporate officers continue in office until others are elected. The old president, treasurer, and secretary had, at least, a colorable right to direct the institution of these proceedings, and there is nothing appearing in evidence to sustain this objection of defendant.

The instruction submitting to the jury the question as to whether or not the corporation was dissolved, was properly refused, as also the instruction that plaintiff could not recover if this suit was instituted before the bond sued on was declared forfeited and due by the board of directors, or before the board ordered the institution of proceedings.

2. It is next insisted that the court below erred in giving the following instruction at the instance of plaintiff:

"If the jury believe from the evidence that the defendant borrowed from plaintiff $3,400, being $200 on each of his seventeen shares of stock, and received said sum less the premium he had agreed to pay therefor, he at that time being one of the directors of plaintiff, and that a full settlement had never been made between plaintiff and defendant for said demand, and that when this suit was brought, nor since, said company has received no sum from defendant on account of said debt, then they should find for plaintiff for such sum as they may believe still due to plaintiff, said sum, however, not to exceed $3,400 with interest from the date of suit."

Counsel for defendant insist that this instruction is bad, because it leaves out of view the credits given to defendant by the petition, and that it is misleading in presenting to the jury that the damages to be considered were the $3,400 borrowed on seventeen shares, and that plaintiff is entitled to recover whatever is due, not exceeding $3,400 with interest from date of suit. The instruction does not take from the jury the consideration of any credits admitted by the pleadings or shown by the evidence. But a question might arise as to the legality of the direction to the jury

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limiting the amount which plaintiff might recover, not to the penalty of the bond, but to the penalty of the bond with interest from the date of suit. The petition in the case asks for judgment only for the penalty of the bond and costs, and is drawn in accordance with what was for many years regarded as the established rule in this State. In some States it is held that, upon breach of the condition of a penal bond, the penalty becomes a debt due in law, from which the obligors may discharge themselves, when the liability exceeds the penalty, by payment of the penalty alone, and that, if this be not done, the penalty will bear interest. This was the early doctrine in Missouri, and in *Price* v. *Rector*, 1 Mo. 77, it was decided that, on a penal bond, interest can be given by way of damages, but subsequently, in *Farrar* v. *Christy*, 24 Mo. 453, the Supreme Court decided that judgment on a penal bond can in no case be entered otherwise than for the penalty of the bond, on which execution will be directed for such damages as the jury may find, not to exceed the penalty of the bond, and this doctrine was again asserted in *State* ex rel. v. *Sandusky*, 46 Mo. 377.

But, in 47 Missouri Reports, the case of the *Union Savings Institution* v. *Edwards* is reported. The penalty of the bond in that case was $15,000, and the jury were instructed that, if Edwards was a defaulter in the sum of $14,352.14, they may find a verdict for that amount with interest at 6 per cent. This is an amount greater than the penalty of the bond.

The original record shows that the verdict is for more than $15,000, though the report of the case does not give the amount of the verdict.

And the attention of the court was specially directed to the point, for the sixth proposition in the abstract of the brief of respondent's counsel, printed with the report, is that "it was competent for the court to give the judgment shown by the record for the penalty of the bond and interest from

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the commencement of the action, restricting execution to the sum awarded by the jury and costs."

The Supreme Court declares the instructions given on this point correct, and says that there is no error in the whole record. This case was decided in 1871, and we are not aware that there has been any ruling of the Supreme Court since, on this point, in a contrary sense, so that it cannot be said that the declaration of law given in the case at bar on this subject was objectionable as a statement of the existing law of this State in that respect.

3. It is further urged that this instruction is erroneous, because it recognized the right of plaintiff to recover $3,400 for a loan of $2,040, and thus directs them to give to plaintiff a usurious interest.

The law does not prohibit a recovery where the interest is usurious, but provides that, where the defendant in his answer alleges that a higher rate of interest than 10 per cent. is agreed for or received, and the answer is sustained by the verdict of a jury, or finding of a court, judgment shall be rendered for the principal sum, and interest at 10 per cent., and the court shall direct the whole interest, when collected, to be applied to the school fund of the county.

In this case, no instruction was asked as to the question of usury, and no direction to the jury was asked or given on the subject, consequently there is no finding that the transaction was usurious. But, even though it plainly appear by the evidence to be usurious, it was a contract which plaintiff, by its charter, had authority to make.

Defendant, under the provisions of the charter of the corporation, of which he was director, bid 40 per cent. for this loan at 6 per cent. per annum. He has had the money and paid no interest for nearly fifteen years. He actually received $2,040, and that sum at 10 per cent. for seven years amounted to more than the total penalty of the bond.

Defendant is not asking equitable relief, but, if he were, we cannot see that there is any hardship in the case The

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facts in other cases, to which we are referred, and in which equity has interfered to relieve stockholders from hard bargains with building associations having similar charters, in other States, are not analogous to those presented in the case at bar.

4. It is claimed that the damages are excessive. The sum for which execution was directed to go, on the last entry of judgment, is considerably less than the amount which would seem to have been due at that date, after charging the defendant with the actual sum received and interest, and giving him every credit to which he appears to be entitled.

5. Counsel for appellant also insist that the court below invaded the province of the jury in calculating the interest. This is true, and it was error to do so. The entry of judgment upon the verdict was also objectionable in form, and, the attention of the court being directed to this, an attempt was made below to rectify this by a new entry of judgment, and were the state of the record such as to admit of leaving this last judgment undisturbed, we should feel that there was no error in this case of which defendant could complain.

This claim was nearly barred by the statute when suit was commenced. Almost five years have elapsed since that time, and we are asked by plaintiff if we find nothing requiring a new trial, not to reverse this case for mere error in the form of the judgment, but to give here such judgment as, in our opinion, should have been entered in the court below.

The whole case is before us, and we see no error, up to the entry of the judgment, that would warrant a reversal; but the irregularities from that point are of such a character that we are compelled to remand the case.

Of these irregularities the first in order arose, apparently, from the misprision of the clerk in the wrong entry of judgment, and was clearly amendable at any subsequent term within the period limited by statute.

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It was long ago said by Judge Scott (*Lane* v. *Kingsbury*, 11 Mo.), that in all cases the entry of judgment should be suspended until the expiration of the time within which a motion for a new trial can be made. The contrary practice probably arose at a remote period, when the court was in session each term but a few days. It is to be regretted that an irregular practice in regard to such entries still prevails, and that, to save trouble to the clerk, the verdict and judgment are entered at once. It is this absurd custom which has given rise, apparently, to all the difficulty in the case at bar.

According to the faulty practice prevailing in this matter, on the rendition of the verdict in this case, without giving time for a motion in arrest, judgment was at once entered upon the record of the court below. This entry was not the proper form of entry of a judgment on assessment of damages by a jury in a suit upon a bond with a penalty. A motion to set aside the verdict and for a new trial, and a motion in arrest of judgment, were then filed. Meanwhile, the judgment was in fact recorded, and no motion was ever made to set it aside; no one interested, apparently, adverted to the fact that it had ever been entered. At the next term the motions in arrest and for a new trial were overruled, and whilst the old judgment stood on record unreversed, and without making any order whatever in regard to it, the court, as the record declares, takes the case as submitted anew on the pleadings and facts before it, enters a new judgment for the penalty of the bond, and considering that the verdict of the jury was for $3,400, together with an amount of interest which calculation shows to be $306, and that plaintiff remits $1,397.68, the court makes the necessary addition and subtraction, and directs execution to issue for $2,308.32. Exception is taken by defendant to this action of the court, but no motion is made to set this new judgment aside, and an appeal is taken, without any further action on the part of counsel, to this court.

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The appeal seems to be taken from the first judgment, and if we reverse that, the second judgment, which was regularly entered whilst another final judgment in the same cause remained unreversed, and which has neither consent of parties nor a finding of a jury to support it, will remain. If we reverse the second judgment, we do here what the court below has not been asked to do, and the first judgment still remains of record, with no order reversing it, and apparently a lien and a cloud upon the title of any real estate of defendant in this county. It has, however, been decided that after judgment has been entered up on verdict, though strictly speaking such a judgment should be set aside before a new trial is had, yet, if on motion the judgment is set aside and a new trial granted and had, the judgment will be deemed to have been set aside. *Lane* v. *Kingsbury*, 11 Mo. 402.

We think it better that these irregularities should be corrected in the tribunal in which they occurred, and see no other course before us than to remand the cause for further proceedings in the court below, in accordance with this opinion.

For manifest irregularities both judgments should be set aside, and if plaintiff agree to enter a *remittitur* for an amount which will reduce the amount due to a sum equal to $2,308.32, with interest from the date of the last judgment, then judgment should be entered for the penalty of the bond, with execution for the last named amount. The other judges concur.

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ST. LOUIS RAILWAY SUPPLIES MANUFACTURING COMPANY, Respondent, *v.* THOMAS HARBINE, Appellant. ST. LOUIS RAILWAY SUPPLIES MANUFACTURING COMPANY, Respondent, *v.* RICHARD E. TURNER, Appellant.

April 25, 1876.

1. From July 4, 1865, to November 1, 1870, no corporation could be created in Missouri, the stockholders of which were not liable for the debts of the corporation so far as those debts did not exceed the full par value of the stock by them respectively held.
2. The constitutional amendment adopted in November, 1870, did not have the effect of impairing an obligation incurred by a stockholder prior to that date.

APPEAL from St. Louis Circuit Court.

Affirmed.

Jas. O. Broadhead and *Broadhead & Overall*, for appellant, cited: Wag. Stat. 293, 875; Kritzer *v.* Woodson, 19 Mo. 327; Ochiltree *v.* Iowa R. R. Const. Co., 54 Mo. 117; St. Jo. & Denver City R. R. Co. *v.* Buchanan County Court, 39 Mo. 489; Hawthorne *v.* Baliff, 2 Wall. 10.

Chandler & Young, for respondent, cited: Ochiltree *v.* Iowa Const. R. R. Co., 21 Wall. 249; Hawthorne *v.* Balef, 2 Wall. 10; Provident Savings Institution *v.* Jackson S. Rink, 52 Mo. 552; State Savings Institution *v.* Kellogg, 52 Mo. 583; Franciscus' Case, 43 Mo. 463; Corning *v.* McCullough, 1 Comst. 56; Wag. Stat. (1872) 291, sec. 13.

GANTT, P. J., delivered the opinion of the court.

These two cases may be considered together.

The petition in the first showed that the St. Louis and St. Joseph Railroad Company was a corporation created and organized under the laws of Missouri, in 1868, for the construction of a railroad between St. Louis and St. Joseph; that plaintiff sold and delivered to it, during the year ending September, 1870, goods, wares, and merchandise to the amount of $6,624.26, which the railroad company never

paid; that on September 29, 1870, the railroad company was dissolved, and was adjudged a bankrupt on December 24, 1870; that plaintiff presented its claim against the assignee in bankruptcy, and received a small dividend, leaving a balance unpaid, including interest, of $7,010.62; that at the time the goods were so sold and delivered the defendant was stockholder, having $5,000 of the stock of the railroad company, and so continued up to the dissolution of the corporation, and plaintiff thereupon asked judgment against Harbine for $5,000, pursuant to the Constitution and laws of Missouri.

The defendant, after a formal denial of the indebtedness of the railroad company to the plaintiff, alleged that plaintiff had instituted suit against R. E. Turner, who was also a stockholder of the railroad company, to the amount of $5,000, for the same cause of action, and had got judgment against Turner for $5,000.

At the trial the court found the issue joined in favor of the plaintiff, and gave judgment against Harbine for $2,381, the balance of its claim over and above the judgment against Turner, and refused an instruction, asked by defendant, that defendant is not liable to the plaintiff in this action if it appears that he has fully paid for his stock to the railroad company.

In the case of Turner the facts are the same, *mutatis mutandis*. The point urged by appellant in each case is that the liability of the defendants, as it stood when the goods, wares, and merchandise were furnished to the railroad company prior to September, 1870, was in the nature of a penalty, and was discharged by the change of the Constitution and the repeal of the laws creating and enforcing the penalty before the commencement of these actions.

The actions were commenced on August 18, 1874, and October 23, 1874, respectively.

The respondents, on the other hand, contend that the stockholder was bound by a contract to answer to the

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creditors of the corporation to the amount of his stock, and that the obligation of this contract was not liable to be discharged or impaired by any act of the State of Missouri, organic or otherwise.

1. We are of opinion that the defendant in each case is liable to the creditors of the corporation at least to the amount of his stock, notwithstanding that it has been fully paid for.

The 6th section of the 8th Article of the Constitution of Missouri, adopted in 1865, and in force until November, 1870, was in the following words: "Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock." Of course, before the adoption of this constitutional provision, it was competent for the General Assembly, in every special charter granted, to declare that the rights of the creditors of the corporation should be still more effectually guarded than they were from 1865 to 1870. What was novel and peculiar about the provision of the Constitution of 1865 was the insertion of this protection to creditors in the Constitution. So long as it remained there, no corporation could be created after July 4, 1865, the stockholders of which were not in the position of limited partners; that is to say, they were liable, necessarily, to pay the debts of their association, *at least* as far as these debts did not exceed the full par value of the stock by them respectively held; and, if such stock had not been paid for in full, the stockholder was further liable to the amount of anything unpaid on his stock subscription. But this was the inferior limit of the liability of the stockholder. The General Assembly had full power by statute to declare that each stockholder should be liable, *in solido*, for the debts of the corporation, in the same manner that each member of a firm is liable for

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all the obligations of the partnership. In former years, the General Assembly had made some steps in this direction, but the increased liability of the stockholder had generally been treated as a penalty for the neglect of some duty, and not as a matter accruing from the contract of indebtedness. In the act of 1845, chapter 34, it was by the 13th section provided that, unless exempted by their charters, the stockholders of all corporations thereafter created should be liable to have their individual property taken on execution to satisfy the debts of the company, in case of a deficiency of corporate assets, to the amount of their stock, *and no more.* By section 18 of the same chapter, the duty was enjoined on every corporation thereafter created to publish, annually, a statement of its debts; and a failure to do this made all the stockholders liable, *in solido*, for the debts of the corporation. By section 19 the payment of any unearned dividend made the directors liable in like manner; and by section 20 the incurring of debts in excess of the capital stock actually paid in involved similar consequences. These provisions were reënacted in the Rev. Code 1855, ch. 34, secs. 13, 18, 19, and 20.

It will be seen that sections 18, 19, and 20 are in terms of a penal nature. They inflict punishments for neglect of duty on the parties guilty of that neglect. By section 18 the duty of making publication of its debts is laid on the corporation at large. It was to be performed by a meeting of the stockholders; and, for a failure to perform it, the stockholders were declared punishable. By section 19 the paying of any unearned dividend, leading to the insolvency of the company, which would be done, if at all, by the directory or administrators of the company, was declared to entail a penalty on the directors under whose management it occurred; and by section 20 the incurring of any debt in excess of the paid-up stock was punished in the same manner. In *Kritzer* v. *Woodson*, 19 Mo. 327; *Cable* v. *McCune*, 26 Mo. 371, and *Cable* v. *Gaty*, 34 Mo. 573,

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the penal character of these several sections is recognized, and in each case the decision turned upon this character.

The 13th section of the acts of 1845 and 1855 has never been supposed to be penal in its nature. It is remedial rather. But it is carefully confined to a single case, and it makes what is the inferior limit of the stockholder's liability in the Constitution of 1865 the largest measure of the recourse of the creditor against him. In language which we think imports nothing but the liability of a contractor for a debt incurred by himself or his lawfully appointed agent, the Constitution of 1865 proclaims that to this extent, *at least*, all stockholders of all corporations thereafter created shall be liable. The mode of enforcing this liability was committed to the General Assembly. That body, at the first session held after the adoption of this Constitution, declared (sec. 20 of ch. 62, p. 330, of Gen. Stat. of Mo.): "If any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue," etc. The rest of the section refers only to the manner of compelling contribution after one stockholder has paid in this manner a debt of the corporation, and need not be quoted here.

Now, as long as there was no such prohibition as is contained in the constitutional amendment adopted in 1870, the General Assembly was perfectly competent to pass such a statute as this, and any one gaining a right of action under it could not be deprived of this right by any instrumentality of the State of Missouri, unless this right of action were in the nature of a penalty merely. We are of opinion that it was not of such a nature. We think it plainly appears, by the petition, that the defendants were stockholders both when the debt was contracted and when the corporation was dissolved, and so were within the scope both of the Consti-

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tution and the statute of 1865; that by reason thereof the plaintiff had a clear right of action against the defendants; that in enforcing this right the Circuit Court has kept within the measure of the remedy given by the statute; that this liability of the defendants was not a matter arising *ex delicto*, but *ex contractu;* that it grew out of the relations established by the law between the creditor and the stockholders of a corporation; and that the latter were as much bound, and in the same manner, by the contract entered into between the creditor and the authorized agents of the corporation as would be the members of a commercial firm for debts contracted by their agent with the creditors of the partnership. The rights thus existing were beyond the reach of the repeal of the 6th section of article 8 of the Constitution of 1865. *Hawthorne* v. *Balef*, 2 Wall. 10. For the purpose of protecting the rights of the creditors, that statute and that section of the Constitution of 1865 must be regarded as still in force.

We therefore affirm the judgment of the Circuit Court in both cases, all the judges concurring.

D. ROBERT BARCLAY *et al.*, Respondents, *v.* BARTON BATES, Appellant. 2 139 / 38 652 / 2 139 / 153a 682

April 25, 1876.

A memorandum, made by the sheriff, acting as trustee under a deed of trust, of a sale of a leasehold, setting forth the description, terms of sale, date, and name of purchaser, is competent evidence in a proceeding to charge, as assignee of the lease, the party named in such memorandum. It tends to show a contract of sale.

(On motion for rehearing.) The sheriff, in such a case, sells as sheriff, not as auctioneer; and a memorandum, made on the day of the sale, and shortly after it, if otherwise sufficient, will satisfy the statute of frauds. This memorandum need not be made by the deputy who makes the sale.

APPEAL from St. Louis Circuit Court.
Affirmed.

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E. B. Sherzer, for appellant, cited: 1 Chitty on Pl. 227, 228; Turner *v.* Egles, 3 B. & P. 456, 461; Bristow *v.* Wright, 1 Douglas, 641, 665, 667, 668; 1 Greenl. on Ev. 62, sec. 51; 3 Ph. on Ev. (10th ed.) 393, 466, 467; 1 Wag. Stat. 655, sec. 2; Meadows *v.* Meadows, 3 McCord, 458, 459, 460; Tatum *v.* Holliday, 59 Mo. 427; Hook *v.* Turner, 22 Mo. 333, 335; Quackenbose *v.* Clarke, 12 Wend. 555, 556, 557; Boyce *v.* Bakewell, 37 Mo. 492, 498; Odell *v.* Wake, 3 Camp. 394; Taylor *v* Shumate, 1 B. & P. 22; Bagley *v.* Freeman, 1 Hilt. 196, 197; McLenen *v.* Sheble, 45 Mo. 130, 131.

Marshall & Barclay, for respondents, cited: Taylor *v.* Zepp, 14 Mo. 482; Chouteau *v.* Goddin, 39 Mo. 229; Bunch *v.* Beck, 46 Mo. 327; Major *v.* Rice, 57 Mo. 384; Rutherford *v.* Tracy, 48 Mo. 325; Rice *v.* Bunch, 49 Mo. 231; Armstrong *v.* Wheeler, 9 Cow. 88; Carter *v.* Hammett, 12 Barb. 253; Garnhardt *v.* Finney, 40 Mo. 450; Smith *v.* Niver, 2 Barb. 180; Clemens *v.* Broomfield, 19 Mo. 118; Mathews *v.* Tobener, 39 Mo. 115; Allen *v.* Sales, 56 Mo. 28, 37; Campbell *v.* Johnson, 44 Mo. 247; Doe *v.* Wilkinson, 3 B. & C. 413; Willison *v.* Watkins, 3 Pet. 43; Brown *v.* Bowen, 30 N. Y. 540; Welland Canal *v.* Hathaway, 8 Wend. 483; P. W. & B. R. R. *v.* Howard, 13 How. 336; Wag. Stat. 655, sec. 2, p. 1033, sec. 1, p. 1034, secs. 2, 3, p. 1047, sec. 2; Brown on Stat. Fr. secs. 357, 369, 371, 372, 373, 508; Ward *v.* Steamer, 7 Mo. 582; Shuetz *v.* Bailey, 40 Mo. 75; Belknap *v.* Sealey, 14 N. Y. 143; Manice *v.* Brady, 15 Abb. Pr. 173; Bauer *v.* Franklin County, 51 Mo. 205; Riddles *v.* Aikin, 29 Mo. 453; Babbett *v.* Young, 51 Barb. 466; Underhill *v.* N. Y. R. R., 21 Barb. 489; Trowbridge *v.* Didier, 4 Duer, 448; Boynton *v.* Boynton, 43 How. Pr. 380; Carroll *v.* Paul, 16 Mo. 226; Willman *v.* Dismukes, 42 Mo. 101; Godemier *v.* Aspinwall, 43 Ill. 401; Guy *v.* Washburn, 23 Cal. 111; Bettis *v.* Logan, 2 Mo. 2; Shaw *v.* Potter, 50 Mo. 281; Souverbye *v.* Arden, 1 Johns. Ch. 240; Bryan *v.* Wash, 7 Ill. 557; Stewart *v.* Weed, 11 Ind. 92; Gist *v.* Eubank, 29 Mo. 248;

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Dinkle *v.* Gundlefinger, 35 Mo. 172; Purchase *v.* Mattison, 6 Duer, 587; Root *v.* Foster, 9 How. Pr. 37; St. John *v.* Griffith, 1 Abb. Pr. 39; Schmidt *v.* Pehmaelter, 45 Mo. 502; Williams *v.* Woodward, 2 Wend. 487; May *v.* Sheehy, 4 Cranch, C. Ct. 135; Acker *v.* Witherell, 4 Hill, 112; Rose *v.* Davis, 11 Cal. 132; Draper *v.* Shoot, 25 Mo. 203; Schools *v.* Risley, 40 Mo. 356.

BAKEWELL, J., delivered the opinion of the court.

This was an action against appellant for breach of certain covenants of a lease of which it is alleged that appellant was assignee.

The petition states that plaintiffs executed and delivered to Kalb and Day a lease for certain premises in St. Louis; that the Western White Lead Company, assignees of the lease, assigned the same to one Smith, to secure the payment of certain notes; that the trustee, Smith, died, and the sheriff of St. Louis county was appointed to execute the trust; and, default having been made in the payment of these notes, that the sheriff did, at the request of the beneficiary, proceed to sell said leasehold estate, at the door of the court house, in St. Louis county, according to the terms of said deed, and the defendant being the highest bidder, at the price of $1,000, the same was stricken off and sold to him accordingly; that the sheriff then executed and delivered to defendant a deed of said leasehold; that the defendant paid the consideration, accepted said deed, and soon after took possession of said estate, and regularly attorned to plaintiffs, under said original lease to said Day and Kalb, by regularly paying the rent therein reserved, in manner, form, and amount as therein provided, up to the time of the default complained of; that plaintiffs have performed all covenants of the lease on their part, but that defendant had broken certain covenants of the lease. The petition sets forth the covenants and breaches of the original lease, in separate counts, and asks judgment for rent, $1,000, for all taxes for the year 1871, and for all taxes for 1872, with a separate prayer for judgment on each count.

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The answer denies all the material allegations of the petition.

The issues were referred to a referee, who in due time filed his report, in which he states that the only allegations of the petition not sustained by evidence are that the defendant received a deed from the sheriff and entered into possession of the premises; and, considering the mere payment of rent for only a portion of the term created, without receiving any written assignment of the lease, and without having possession of the premises, not sufficient to charge the person paying rent with the liability of an assignee upon the covenants of the lease, he finds for defendant.

Exceptions were duly filed by plaintiffs, which were overruled, and judgment was entered for defendant. A motion for a new trial having been filed and overruled, on appeal to general term the judgment was reversed and the cause remanded. From this judgment of the general term the defendant appeals to this court.

On the trial before the referee it appeared that the leasehold was purchased by defendant, at the sale under the deed of trust, by James H. Britton, for $1,000; that defendant, when apprised of this action of his agent, paid the $1,000 to the sheriff, and that defendant also paid rent to plaintiffs, and paid back taxes due upon the property at the time of the sale.

On the hearing before the referee, plaintiffs offered in evidence a memorandum made by a deputy sheriff, at the date of the sale, on the sheriff's sale book, as follows:

"*St. Louis, September 12, 1870.*

"THE WESTERN WHITE LEAD CO.
to
T. T. SMITH, *trustee of Robert H. Ober.* } Deed of trust in recorder's office, book 354, p. 315.

"Sold the leasehold of real estate advertised as follows: to wit:

"A certain lot or parcel of ground situate, lying, and being in the city of St. Louis, Mo., all the lot of ground in the city of St. Louis, in block 196, beginning at a point in the

west side of Ninth street, 77 feet to the north side of Walnut street; thence westwardly, along the north side of Walnut street, 125 feet, more or less, etc.,

To Barton Bates, for the sum of..............		$1,000.00
COSTS AND CHARGES.		
Advertising in *Democrat*.............	$55.00	
Commissions	20.00	
Affidavit and acknowledgment	1.00	
Deeds and stamps....................	6.00	
Services of attorneys, Harding & Crane,	25.00	107.00
Net proceeds.........................		$893.00

"Received, St. Louis, Mo., December 9, 1870; of John McNeil, eight hundred and ninety-three dollars, in full of the net proceeds of above sale, on account of the debt represented by two notes of $1,000 each, held by the National Bank of the State of Missouri, secured by above deed of trust."

C. F. BURNES, *Attorney of Bank.*

Defendant objected to this evidence, but on what ground does not appear. It was excluded by the referee.

We think that plaintiffs were clearly entitled to this memorandum. It is true that it does not satisfy the statement, in the petition, that defendant, at the time of the sale, received a deed from the trustee, but it does not follow that it was incompetent for every purpose because it was not a deed. It was certainly evidence tending to show a contract of sale. If plaintiffs could prove facts entitling them to recover in the action, they should have been allowed, if necessary, to amend their petition to make it correspond to the proof by striking out any averments as to the actual execution and delivery of a deed. The sheriff acted in his official capacity in making this sale, and he could bind both parties by a sufficient memorandum made at the time. *Tatum* v. *Holliday*, 59 Mo.

Whether this memorandum was such an assignment

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of the lease as to make the defendant liable as assignee on the covenants of the lease it is not necessary for us to determine. The evidence excluded was, in our opinion, competent and material, and for this error the judgment of the Circuit Court at special term must be reversed and the cause remanded.

The judgment of the Circuit Court at general term, reversing the judgment of special term and remanding the cause for a new trial, is therefore affirmed. The other judges concur.

BAKEWELL, J., delivered the opinion of the court, on motion for rehearing.

The appellant files a motion for a rehearing in this case, and files printed copies of reasons in support of this motion.

1. The first reason alleged is that "the court has mistaken the record, if, in its opinion filed, it meant to state that the deputy who was present at the sale made the memorandum rejected by the referee as evidence in this suit."

But the writer of the opinion complained of did not mean to say this, did not say it, and did not say anything like it, and we do not know why counsel should suppose he must have meant it, unless he thinks that, to make a sufficient memorandum to satisfy the statute in case of a sale of real estate by the sheriff, the same deputy who makes the sale must, necessarily, make the memorandum of the sale. This seems to be his view of the law, but it is an erroneous view. As it is the officer, not the individual, who is clothed with authority, the acts of each deputy are the acts of the sheriff. The authority of the deputy sheriff is coequal with that of his principal; and the sheriff may create as many deputies as he pleases, each possessing all the power of a sheriff as a ministerial officer. 1 Salk. 95, 96. A sale may be made by one deputy, and it may be consummated by another deputy. If one deputy becomes incapacitated to complete the execution of process, it may

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be consummated by another deputy, as well as by the sheriff himself. So, if a sale be made by one deputy, the memorandum may be made by another deputy. In either case it is the sheriff who acts, and not Deputy Wilkins or Deputy Holly. 3 Cow. 95; 20 Wend. 602; 6 Wend. 224; 10 Johns. 223. Or, rather, both the sheriff and his deputy act—the one in fact, the other in the judgment of law. The case of a sheriff is not precisely that of an auctioneer.

2. The memorandum in this case was not, as counsel asserts, invalid under the statute, if made by a deputy who was not present at, or who had nothing to do with, the sale. It was not necessary that the memorandum should be made on the fall of the hammer. It is true that a remark of that kind escapes from Judge Story in *Smith* v. *Arnold*, 5 Mass. 419, speaking of an ordinary auction sale. But this is a mere *dictum*, made in illustration of an entirely different question. It is not approved; and, except for that remark, there is no intimation from any respectable source that the memorandum must be absolutely contemporaneous. There is no decision to that effect. In *White* v. *Watkins*, 23 Mo. 427, the Supreme Court of this State decides that a memorandum made a month after the sale is too late. In *Buckmaster* v. *Harrop*, 13 Ves. 464, it is said that an auctioneer must make the writing at the time of the sale, in his character of auctioneer of that sale; that it is too late afterwards, at a distant time, to supply the defect. It has been held, on the other hand, in England, that the memorandum may be made at any time before action is brought. 13 Ves. 456; Brown on Stat. Fr. sec. 353. And in the case of brokers' bought and sold notes, which are held sufficient to satisfy the statute, it is manifest that the contract is completed some time before the memorandum is made. Even in the case of an ordinary auctioneer it has never been decided that the memorandum must be made at the instant. In the case of the sheriff there is no good reason to doubt

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that a memorandum made by a deputy, according to the custom of the office, on the day of, and shortly after, the sale, if otherwise sufficient, will satisfy the statute. The sheriff sells as sheriff, not merely as auctioneer, and his character does not die with the sale, as may be the case with a private individual crying off property at request of another. The fact that one deputy makes the sale, and another the memorandum, does not make this the case of a mere report of facts to a third person, and the memorandum mere hearsay testimony. The auctioneer may use the hand of his clerk to make the contemporaneous memorandum, and the sheriff may use the voice of one deputy to make the sale, and the hand of another to make the note of it; in either case, it is the sheriff that acts. Our own Supreme Court, in *Miles* v. *Davis*, 19 Mo. 412, has gone, indeed, further in this matter of a sheriff's memorandum than any case we have cited from abroad.

3. The third reason assigned for granting a rehearing is that the respondents were not injured by the rejection of the sheriff's memorandum, even if improperly rejected. A verdict and judgment was given against plaintiffs, and it appears that competent evidence was improperly rejected on the trial. It will not do to say that plaintiffs were not injured by this rejection. Appellant urges that plaintiffs had the full benefit of all legitimate inferences to be drawn from the sale, bid, payment of money, name of the purchaser, etc. But, as the statute prescribes that oral proof of the contract shall not be received in case of a sale of lands, we do not perceive how this can be so. If this contract were clearly executed on both sides, the rights and obligations of the parties would not be affected by the statute; but defendant will not admit that there was any executed contract of sale. In the absence of the legal evidence of a contract of sale of lands, of a memorandum in writing of the agreement made, and of the names, price, and subject-matter, a sale of an interest in lands has been held void, though the pur-

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chasers have paid the money and entered into possession. *Abbott* v. *Draper*, 4 Demrs. It must, then, be material to plaintiff to prove the contract. This court has not said, or intimated, that the sale, if proved, was an assignment of the lease. We hold that it might be a material fact in this case, on other grounds, and that defendant had a legal right to show, if he could, a binding contract of sale.

4. The fifth and sixth reasons are that the court has not passed upon certain points made by counsel in his argument and brief, and regarded as decisive of the case. This is no ground for a rehearing. In reversing and remanding a cause, an appellate tribunal may, and sometimes does, anticipate by announcing an opinion on points which it sees may probably arise on the new trial, but it is under no obligation so to do; and grave reasons may, and sometimes do, exist for refraining from expressing an opinion on points which may or may not be made on the second trial. It by no means follows that the points have been overlooked, or that the court has not done its full duty in the matter.

Finally, there is nothing in the opinion filed by the court to justify the expression of an apprehension on the part of counsel that this court has reversed the cause for the mere purpose of directing amendments in pleadings which have not been applied for by the party against whom judgment has gone. This suggestion is, perhaps, open to the objection that it is to some degree a violation of the decorum of the profession, and the same may be said generally of the form into which counsel has thrown the reasons which we have considered. It is to us a subject of regret that learned gentlemen, in the excitement of the contests of the profession, should to any degree, and however briefly, forget how important to the administration of justice is the observance of the customary forms of courtesy and respect in the official intercourse of the bench and the bar. Not to err is to be above the lot of humanity; and it is to ask too much to expect that the decisions of a tribunal, even of last resort,

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shall always be received with interior assent, but under no circumstances should the respect due to the judicial office be wholly laid aside. The intrinsic reason of this respect is not, of course, any theory that the court is exempt from the possibility of error, or that it does not sometimes suffer from the infirmity of its members.

This court, after careful consideration, decides, in the case at bar, that, where suit is brought, seeking to charge one as assignee of a written lease, and the petition sets up an assignment by deed, and no deed is shown, it is error to refuse to admit evidence of a sale of the leasehold interest, witnessed by a memorandum in writing which will satisfy the statute of frauds; that such evidence is material and competent.

Also, that where the sale is made by the sheriff, acting as trustee under a deed of trust, a memorandum which in other respects satisfies the statute is not void because not made on the ground, and may be made by a deputy sheriff other than the one conducting the sale.

There were other points in the case upon which, for reasons satisfactory to itself, this court did not see fit to pass in the opinion rendered. It adheres to its judgment, and desires to express no opinion upon the points not already decided.

The motion for a rehearing is overruled. The other judges concur.

Leverett F. Hastings, Plaintiff in Error, *v.* Stephenson Woods *et al.*, Defendants in Error.

April 25, 1876.

A public school building, erected and used exclusively for the purposes of public education, is not subject to a mechanic's lien for materials furnished the contractor.

Error to St. Louis Circuit Court.

Affirmed.

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Taylor & Whitney, for plaintiff in error, cited: Wag. Stat. 604, sec. 10, p. 907, sec. 1; Heller *v.* Stremmell, 52 Mo. 309; 2 Pars. on Con. 515; Broom's Leg. Max. 626; Shattel *v.* Woodward, 17 Ind. 225; Roth *et al.* *v.* Tiedman and Board of Education, 53 Mo. 490; Board of Education *v.* Greenbou & Son, 39 Ill. 612; City of Chicago *v.* Hasley, 25 Ill. 595; 2 Gavin & Hood, Ind. St. 298; Williams *v.* Controllers, 18 Pa. St. 275; Brinckerhoff *v.* Board of Education, 37 How. Pr. 512; Paillon, Admr., *v.* Mayor of City of N. Y., 47 N. Y. 666; Dunn *v.* North Mo. R. R., 24 Mo. 465; McPheeters *v.* Merrimac Bridge Co., 28 Mo. 467; Collins *v.* Megraw, 47 Mo. 495; Tucker *v.* Gest, 46 Mo. 339.

R. E. Rombauer, for defendants in error, cited: Dunn *v.* North Mo. R. R., 24 Mo. 493-495; Williams *v.* Controllers, 18 Pa. St. 275–277; Foster *v.* Fowler, 60 Pa. St. 27–30; Brinkerhoff *v.* Board of Education, 37 How. Pr. 520; Ph. on Liens, sec. 179; Abercrombie *et al.* *v.* Board of Education, 60 Mo. 23.

BAKEWELL, J., delivered the opinion of the court.

This action is by the plaintiff, as sub-contractor, against Woods and Barnes, original contractors, and "The Board of President and Directors of the St. Louis Public Schools," owner, to enforce a mechanic's lien.

The case being submitted to the court, judgment was given for plaintiff against the defendants Woods and Barnes, and in favor of the other defendant, the Board of President and Directors of the St. Louis Public Schools. The plaintiff having duly excepted to the action of the court below, in striking out his reply to the separate answer of defendant, the Board of President and Directors of the St. Louis Public Schools, in refusing an instruction asked by him, and in overruling his motion for a new trial, the cause is brought here by writ of error.

The only question presented for decision is whether or no a public school building, erected and used exclusively for

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purposes of public education, is subject to a mechanic's lien for materials furnished to the contractor, under the statute relating to mechanic's liens.

It is quite clear that it is not. The decisions of the Supreme Court have restricted the terms of the general act to buildings, etc., belonging to private individuals. The question as to school-houses is expressly decided in *Abercrombie* v. *Ely*, 60 Mo. 23. The judgment of the Circuit Court is affirmed. The other judges concur.

WILLIAM C. JAMISON, Appellant, *v.* WILLIAM D. GRISWOLD, Respondent.

April 25, 1876.

In 1872 G. and wife executed a deed, conveying certain real estate to "the people of the city and county of St. Louis," for the purposes of Forest Park, and declared therein that the real estate remained subject to the payment of certain Forest Park bonds, issued for the purchase money of the land conveyed. The act of 1872, establishing Forest Park, was held to be unconstitutional, and another act for the same purpose, free from constitutional objections, was passed in 1874. Under the provisions of this act, the land conveyed by G. and wife, in 1872, was taken for the use of the park, its value being fixed at $58,743, which was paid into the Circuit Court for the use of the owners of the land. Certain of these bonds had passed out of the hands of G. into the hands of J. *Held*, that G. was estopped to deny the validity of the bonds, and that J. was entitled to be paid therefor out of the assessed value of the land then in court.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

T. C. Reynolds, for appellant, cited: Remsen *v.* Graves, 41 N. Y. 471; Erwin *v.* Downs, 15 N. Y. 575; Nightingale *v.* Withington, 15 Mass. 272.

S. M. Breckinridge, for respondent, cited: Byles on Bills (4th ed.), 123; Story on Prom. Notes (6th ed.), 124, sec. 117; Nutwell *v.* Tongues' Lessee, 22 Mich. 419.

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GANTT, P. J., delivered the opinion of the court.

Under an act of the General Assembly, approved March 25, 1872, to establish Forest Park (Session Acts of 1871, adjourned session, p. 255), Leffingwell, Baker *et al.* were made commissioners of the park, with power (sec. 9) to obtain from the proprietors of the land within its limits, by agreement upon the price, the title to such land; and, in case of failure to agree, provision was made for obtaining the title by condemnation. By section 11 the commissioners were directed to issue their bonds, designating them as "Forest Park bonds," running for twenty years, with 7 per cent., payable semi-annually, with coupons attached, and secured on the lands so purchased or condemned by such instruments in writing as the commissioners might agree on, which should be in every instance a first lien on the land. On October 23, 1872, Griswold and wife acknowledged the execution of a conveyance, dated October 2, 1872, for certain real estate within the park, according to the provision of section 6. It recited that the grantors had agreed with the park commissioners to sell the lands, and proceeded to sell them, to the "people of the city and county of St. Louis," by the words *grant, bargain, and sell*, but subject to the conditions that, whereas, the commissioners, in consideration of the conveyance, had issued and delivered to Griswold certain Forest Park bonds, numbered, etc., dated, etc., said bonds being issued for the purchase money of the premises conveyed, if the bonds should be paid, then the lands should be released, but if they should remain unpaid, then the lien should be enforced in the manner provided for by the General Statutes of Missouri for the foreclosure of mortgages, deeds of trust, etc. It was further provided that, if it should become desirable, the commissioners might subject to one general lien or incumbrance all the lands in the park, for the purpose of securing all the bonds issued for the purpose of raising the purchase money.

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It would appear that the bonds thus issued to Griswold were made payable to W. D. Griswold, or bearer, and that they afterwards came into the possession of Jamison. How they passed from Griswold does not appear.

The act incorporating the commissioners of Forest Park was declared to be unconstitutional in the year 1873 (54 Mo. 458, 477). In March, 1874, another act was passed, having the same title, and creating a park with the same limits that were defined in the act condemned by the Supreme Court. This last act was upheld by that tribunal.

By section 2 of this act the County Court of St. Louis county was empowered to institute proceedings to condemn for public use the land within the limits of the park, and by section 3 it was provided that, if the title to any such land should be in dispute, the Circuit Court should make any order respecting it which it deemed fit, not inconsistent with that act. Proceedings were commenced to condemn the land, against W. D. Griswold and others, and W. C. Jamison intervened, setting forth the facts before recited, and claiming that the bonds held by him were a lien on the land of Griswold; that this land had been condemned for the purposes of a park; that its assessed value, $58,743, had been paid into the Circuit Court by the County Court of St. Louis county, and praying the court to decree that the bonds held by him should be paid to him out of this fund. W. D. Griswold demurred to this claim, alleging that it did not exhibit a cause for relief, because the act of March 25, 1872, being unconstitutional and void, and the board of commissioners mentioned in it having no legal existence, the bonds issued by them were of no legal validity or value, nor capable of being secured by said deed. The Circuit Court sustained the demurrer, and gave judgment against Jamison and in favor of Griswold, and, after the usual motion, the case was brought to this court by appeal.

The statement made by appellant, which is very full and

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perspicuous without redundancy, is accepted as correct by the respondent.

The bonds issued by the commissioners acting under the unconstitutional act of March 25, 1872, were in no sense binding on the people of the county of St. Louis; but they would not have been binding on the county even had that act not come within the prohibition of the organic law. It was provided in the 11th section of that act that the bonds issued by the commissioners should be secured on the lands purchased or condemned by such instruments in writing as the commissioners might agree upon, "but the city or county of St. Louis shall not, in any event or in any manner whatever, be responsible for the payment of the principal or interest on said bonds." It was intended that the land condemned or purchased should be the fund whereout the redemption of the bonds should come; and it remains to inquire whether the provisions made in the deed executed by Griswold to the people of the city and county, as agreed on by the commissioners, remain, notwithstanding the nullity of the act of the General Assembly, a valid incumbrance on the land in the hands of Griswold.

Let it be supposed that directly upon the delivery of this deed to the commissioners, and the delivery to Griswold of the bonds, the judgment of the Supreme Court declaring the act a nullity had been pronounced. Obviously the whole transaction would have fallen to the ground. The deed and the bonds would have been alike waste paper.

But this is not the case before us. The bonds have passed into the hands of a third person, and we must presume that in some manner Griswold has profited by their transfer. Otherwise he would surely be heard complaining that the securities, if enforceable at all, were enforceable by him alone, and that plaintiff was a volunteer or an intruder.

If plaintiff had given value for the bonds, directly or indirectly, to Griswold, and, no further legislation having

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occurred, Jamison had claimed the lien declared by Griswold in his deed of 1872, we do not see what answer could have been made in opposition to his claim. The lien had been created by the voluntary act of Griswold. We are relieved of all the embarrassing questions that might have arisen if, instead of this voluntary deed, proceedings to condemn the land of Griswold had been conducted under the supposed authority of the Forest Park act of 1872. Obviously there is a wide difference between the operation of a deed executed by a competent party, and creating a lien in the enforcement of which third persons, giving credit to the recitals and provisions of the instrument, have become interested, the only objection to which is that the grantee has no legal existence, or no legal capacity to take the estate which the deed professes to convey, and a decree of a court in a cause to which this incapable grantee is one party, and the other is a person who resists the proceedings at every step. We need not dwell on these differences. We have before us the case of one who, in 1872, with his own free consent, and with his eyes open, agreed to a sale of his land for certain securities, retaining a lien on his land for assuring the payment of these securities. There can be no question that he thus gave to them the only value they possessed. They were not in any proper sense the obligations of the city or county, for it was expressly declared that neither was answerable for their payment; they were not the obligations of the individual commissioners; and the only source of payment to which any person could look was the land itself for which they issued, and on which a lien was reserved or created to secure that payment. The deed executed in 1872 to the people of the city and county was either operative to convey to them the title of Griswold or it was not. If it did so operate, the grantee took the title *cum onere*—subject, that is to say, to the payment of the bonds, for Griswold will hardly contend that the grantee was discharged of the obligation to pay the bonds because

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they were nullities, and that, therefore, the people got the land for nothing. If by reason of the want of power to purchase, the people of the city and county took nothing by that deed (a proposition of which the case of *McIndoe* v. *The City of St. Louis*, 10 Mo. 575, may suggest doubts), it by no means follows that, after Griswold has sold the bonds secured by it, and appropriated the proceeds, he can repudiate the conditions which he himself created, and which alone enabled him to sell the bonds at all. As a conveyance the deed may fail. It may—and, under the circumstances shown, it must—stand as an equitable, no less than a legal, mortgage. If, instead of the mortgage clause being expressly set forth in the deed itself, it had been intended to secure all the bonds issued by a general mortgage to be devised by the commissioners, and this intention had been expressed in the bonds, but never actually consummated, the designation of "*equitable* mortgage only" would be more appropriate. As matters stand, no formality seems to be wanting.

It is quite immaterial whether Griswold, on selling the bonds, indorsed them or transferred them, payable as they were to bearer by delivery only. We take it as admitted that he did in some way sell and deliver them, or that he enabled some one else to sell and deliver them; that he was instrumental in sending them forth to the world after having, in the manner stated, given credit to them and provided for their redemption. We almost incline to the opinion that there is something, not appearing by the record lodged in this court, which yet belongs to the record and influenced the judgment of the Circuit Court. As we view it, Griswold can not be allowed to prevail against Jamison in the controversy without the overthrow of some of the most cherished and well-settled principles of equity.

It seems to us that he has induced others to treat these bonds as valid securities by declaring them, in a solemn manner, to be a lien on land belonging to him; that he has

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sold the bonds, the value of which in the market depended solely on the credit due to this declaration, and that his present attitude is that of a man who for some reason, no matter what, now wishes to repudiate that declaration, and deprive of all benefit of the security thereby promised those who have expended their money upon the faith of it. If this can be done, we must unlearn the law on the subject of estoppel. The cases to which the Supreme Court of Missouri has considered it to be applicable were not nearly so strong as that shown by this record. *Taylor* v. *Zepp*, 14 Mo. 482; *Lindell* v. *McLaughlin*, 30 Mo. 28; *Garnhart* v. *Finney*, 40 Mo. 449.

The judgment is reversed and the cause remanded, all the judges concurring.

ANDREW W. MURPHY, Appellant, *v.* GEORGE T. MURPHY, Administrator, etc., *et al.*, Respondents.

April 25, 1876.

1. **A distributee of an estate, though not a party to the record, may appeal from the allowance of a demand in the Probate Court.**
2. **A balance found in favor of a guardian, on settlement made by him in the Probate Court, after the death of his ward, without the notice required by law for final settlement, is not conclusive evidence in favor of the guardian in a suit to establish this balance against the estate of his ward.**

APPEAL from St. Louis Circuit Court.

Affirmed.

A. McElhinney, for appellant, cited: Asbury *v.* McIntosh, 20 Mo. 278; Whittelsey's Pr. 592; Zurnwalt *v.* Zurnwalt, 3 Mo. 269; Harrison *v.* Nixon, 9 Pet. 484; Martin *v.* Kanons, 2 Abb. Pr. 392; Matter of Bristol, 16 Abb. Pr. 397; Anderson *v.* Jones, 11 Iowa, 11; Philips *v.* Shelton, 6 Iowa, 545; Thompson *et al.* *v.* Cox, 8 Jones L. 311; Dunlap *v.* Commonwealth, 2 Call, 284; Beazley *v.* Prentiss, 13 Smed. & M. 97; Kelly's Probate Guide, 374; Schouler's

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Dom. Rel. 464; State to use v. Roland *et al.*, 23 Mo. 95; Mitchell v. Williams, 27 Mo. 399; Brent v. Grace's Admr., 30 Mo. 256; Withers *et al.* v. Hickman *et al.*, 6 B. Mon. 295; Matter of Bostwick, 4 Johns. Ch. 100; 16 Ind. 97; Smith's Appeal, 30 Penn. 397; Stewart *et al.* v. Caldwell *et al.*, 54 Mo. 537.

J. P. Vastine, for respondents, cited: Wag. Stat. 120, secs. 3, 6, p. 65, sec. 81, p. 681, sec. 48; Mo. Stat. (1855) 125, sec. 125, and note *a*; Mitchell v. Williams, 27 Mo. 95; State to use v. Roland, 23 Mo. 397; Galloway v. Woods, 31 Mo. 351.

Bakewell, J., delivered the opinion of the court.

Andrew W. Murphy was guardian of Inez M. Murphy, deceased, whereupon Andrew W. Murphy, at the March term, 1874, of the Probate Court of St. Louis county, presented a settlement of accounts with his ward up to the time of her death. This settlement was entitled by him a final settlement, but was made without the advertisement required by law for final settlements of guardians and curators. At the next June term, Lewis F. Casey, who claimed to be an heir of Inez M. Murphy, submitted exceptions to the settlement; and the Probate Court found a balance due the guardian, by the estate of his ward, of $887.65. Defendant George T. Murphy was appointed administrator of Inez M. Murphy. Andrew W. Murphy then presented for allowance, against the estate of Inez, a claim for the balance of $887.65, appearing to be due him by his last statement. This claim, with interest, amounting altogether to $914.27, was allowed in the Probate Court. Within ten days from the date of said allowance, Joseph P. Vastine, as attorney for Lewis F. Casey, filed an affidavit and bond for an appeal from this judgment of the Probate Court, and the appeal was allowed. On trial *de novo* in the Circuit Court, the claim of Andrew W. Murphy against the estate of his late ward was disallowed, and judgment for costs rendered against Andrew W. Mur-

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phy, who, having filed a motion for a new trial, which was overruled, brings the cause here by appeal.

It appears from the record that, before any evidence was offered in the Circuit Court, plaintiff made a verbal motion to dismiss the appeal, on the ground that it did not appear that appellant was a competent party to take an appeal in the cause. This motion was overruled.

We do not think that the court erred in overruling this motion. If Casey was an heir of Inez Murphy, and a distributee of her estate, he was a party in interest, though not a party to the record. A distributee of an estate is not a party to the record, yet he can appeal from an order of distribution; and why should it be said that he cannot appeal from an allowance that will swallow up a great part of the estate? The affidavit for appeal is not contained in the bill of exceptions. However, the certificate of the clerk of the Probate Court is in evidence, which says that the affidavit was "filed by Joseph P. Vastine, attorney for Lewis F. Casey, one of the heirs of Inez M. Murphy, deceased." As the law requires that the administrator should file, in the clerk's office of the Probate Court, on taking charge of the estate, an affidavit ot the names of the heirs, we think that it may be taken sufficiently to appear, for the purpose of sustaining the right of appeal, that Casey was an heir of the deceased and a distributee of her estate.

The following declaration of law, asked by plaintiff, was refused:

"The court declares the law in this case to be that the settlement of Andrew W. Murphy, as guardian of the person and estate of Inez M. Murphy, read in evidence, is conclusive evidence of appropriations by the Probate Court for the benefit of the ward, to the amount of the balance found in favor of the guardian at the said settlement, and is conclusive in this form of action against the estate of said ward; and if the evidence shows that this demand against

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her estate is founded on the balance so found at the final settlement of said guardianship, then the plaintiff is entitled to recover in this action the amount of the balance so found, with interest thereon from the time of the settlement."

This instruction was properly refused; it is not the law. And, as no evidence of a demand against the estate, except this pretended final settlement, was introduced, the court properly found for defendant.

The settlement offered was binding and conclusive on no one. It had merely the effect of an annual settlement, open to revision and amendment at any time. The only settlement that concludes the guardian of the ward is a settlement made on notice to all concerned, by advertisement, and in compliance with the provision of secs. 48, etc., of the statute concerning guardians and curators. The balance appearing in favor of Andrew W. Murphy, as this last settlement, is no judgment in favor of the guardian, and is not evidence on which to base an allowance in his favor against the estate of his ward. *Wyatt* v. *Woods*, 31 Mo. 351; *State, to use of Thornton*, v. *Hoster*, 61 Mo. 544; *Folger* v. *Heidel*, 60 Mo. 284.

The judgment of the Circuit Court is affirmed. The other judges concur.

MORITZ LOWENSTEIN, Plaintiff in Error, *v.* JOHN KNOPF, Defendant in Error.

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April 25, 1876.

No instrument in writing, except a bill of exchange, not having the words "value received," is a negotiable instrument in Missouri.

APPEAL from St. Louis Circuit Court.

Affirmed.

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Gottschalk, for plaintiff in error, cited: Stagg *v.* Linnepelter, 59 Mo. 336, 339, 340; Barrett *v.* County Court of Schuyler County, 44 Mo. 197; Kilgore *v.* Bulkley, 14 Conn. 362; Miller *v.* Austin, 13 How. 218; Bank of Orleans *v.* Merrill, 2 Hill, 295; Lindsay *v.* McClellan, 18 Wis. 481; Morse on Banking, 52; 1 Pars. on Notes & Bills, 26; Edw. on Bills (2d ed.), 380; Wag. Stat. 216.

Bell & Thompson, for defendant in error, cited: Wag. Stat. 216, sec. 15; Miller *v.* Austen, 13 How. 218; Cate *v.* Patterson, 25 Mich. 191; Blood *v.* Northrup, 1 Kan. 28; Drake *v.* Markle, 21 Ind. 433; Laughlin *v.* Marshall, 19 Ill. 390; Hunt *v.* Divine, 37 Ill. 137; Patterson *v.* Poindexter, 6 Watts & S. 227.

GANTT, P. J., delivered the opinion of the court.

Lowenstein sued Knopf to the April term, 1875, of the St. Louis Circuit Court, setting forth that the People's Savings Institution, by its certificate of deposit dated December 8, 1874, certified that Knopf had deposited $1,000 in said institution, payable three months thereafter to the order of Knopf, with 4 per cent. interest per annum; that Knopf, before the maturity of the certificate, for value, indorsed and delivered it to the plaintiff; that, when the certificate matured, plaintiff presented the same and demanded payment, which being refused, he caused it to be protested for non-payment, and due notice to be given to defendant; wherefore he asks judgment against defendant.

To this petition defendant filed a demurrer, alleging, for causes, that the instrument sued on does not contain the words "value received," and so is not a negotiable instrument, nor defendant held liable thereon as indorser and that, under the allegations of the petition, no liability attached to the defendant.

It was afterwards agreed that this demurrer should be sustained *pro forma*, and the case taken at once to general term, where final judgment for plaintiff or defendant should be rendered on the demurrer. The general term affirmed

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the judgment and gave final judgment for defendant, to reverse which plaintiff prosecutes this writ of error.

1. Of course the determination of this case must depend on the answer to the inquiry whether the instrument sued on was or was not negotiable.

We have a statute of our own defining negotiable paper and ascertaining its qualities, and are not at liberty to inquire what are the provisions of the statute of Anne, with a view to decide whether this case is within its scope. We consider that to be a matter of no moment.

In 1835 the statute of Missouri (Rev. Code 1835, p. 104 and following) declared that (sec. 2) all promissory notes and bonds should be *assignable*, and the assignee might sue thereon in his own name; that every promissory note for the payment of money, expressed on the face thereof to be for "value received," negotiable and payable "without defalcation," should be negotiable as an inland bill of exchange (sec. 6), and that (sec. 7) the payees and indorsees of every negotiable note might maintain actions for the sums of money therein mentioned against the makers and indorsers, respectively, in like manner as in cases of inland bills of exchange, and not otherwise; and that (sec. 9) the assignees of a bond or note, other than a negotiable note as defined in section 6, might maintain an action against the assignor, on failure to obtain payment from the obligor or maker, "only in one of the following cases:" (1) If he use due diligence in the institution and prosecution of a suit against the maker, etc. (2) If the maker were insolvent or non-resident.

Under this act it was held (*Pococke* v. *Blount*, 6 Mo. 338) that a note, payable twelve months after date to the order of A, for value received, was not a negotiable instrument, thus showing that the qualities which constituted paper negotiable were to be looked for in our own statute, and not in that of Anne. In the statute of 1835, again, damages were given to the holder of bills of exchange in some

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instances when "expressed to be for value received." Rev. Code 1835, p. 298, secs. 7, 8. The Supreme Court (*Riggs* v. *City of St. Louis*, 7 Mo. 438) held that *these very words* must be found in the bill, and nothing in the way of terms of equivalent import would suffice to lay the foundation of a claim for damages. The same statutory provisions were found respecting bills of exchange and promissory notes in the Revised Code of 1845. Though arranged under heads somewhat varying from those of the statute of 1835, no substantial difference is to be found, and the same observations are true of the Revised Code of 1855 (ch. 18, 21, pp. 292 *et seq*. and 319 *et seq*).

In 1865 marked changes were made in our laws on this subject. By sec. 15 of ch. 86 (p. 396 of Gen. Stat. of Mo.) it was provided "that every promissory note for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange."

Under this act a note is negotiable without the words "negotiable and payable without defalcation;" and the words "value received" have never been considered as necessary to the negotiability of a bill of exchange, though they are necessary, under our statute, to the maintenance of a claim for damages for its dishonor. These two things are quite different, and should not be confounded. But no other instrument, except a bill of exchange, wanting the words "value received," can be negotiable in Missouri; and this for the sufficient reason that no other instrument is, by our statutes, declared to be negotiable without this express feature. This consideration is decisive, and the judgment of the Circuit Court is accordingly affirmed, all the judges concurring.

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JOHN W. MORSE, Respondent, v. CARL DIEBOLD *et al.*, Appellants.

May 16, 1876.

1. Where the testimony on opposite sides of a material issue is flatly contradictory, the finding of the jury is conclusive, and cannot be reviewed by an appellate court.
2. Evidence of former transactions by an agent, similar to the one in controversy, is admissible as tending to show the extent of his authority, when there is other evidence tending to prove that such transactions were known and approved by the principal at the time of their occurrence.
3. A letter written by the principal, declaring that the agent was invested with certain powers, is proper evidence against the principal to that effect, although not addressed to the adverse party in the cause.
4. If a principal knowingly allow his agent to indorse and discount notes, taken in the course of business, with the name of the principal, and take no steps to make known that the agent has no authority so to do, he will be liable on an indorsement so made by the agent.
5. It was not erroneous to refuse an instruction to the effect that "authority given to an agent to discount at one place, or with one person, does not imply the authority to discount at another place, or with another person," when the only tendency of the testimony, if any, was to prove a general authority to discount at all places and with all persons, as occasion might require.

APPEAL from St. Louis Circuit Court.

Affirmed.

Joseph T. Tatum, for appellants, cited: Story on Ag. sec. 87; 1 Pars. on Con. 48; Black v. Vandervater, 1 Sandf. 265; Lawrence v. Gebbard, 41 Barb. 517; Humphreys v. Haven, 12 Minn. 298; Paige v. Stone, 10 Metc. 160; Combs v. Scott, 12 Allen, 493; Sone v. Palmer, 28 Mo. 539, last paragraph on 542; Pope v. Risley, 23 Mo. 185; Swearingen v. Knox, 10 Mo. 31; Wahrendorf v. Whitaker, 1 Mo. 146; Sweeting v. Pearce, 9 C. B. (N. S.) 534; Graham v. United States Savings Assn., 46 Mo. 186; 1 Pars. on Notes & Bills, 119; Atkins v. Nicholson, 31 Mo. 448; Chouteau v. Filley, 50 Mo. 174; Davidson v. Stanley, 2 Man. & G. 721; Hunt v. Chapin, 6 Lans. 139.

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D. D. Duncan, for respondent, cited: Chitty on Bills, 25; 2 Greenl. on Ev. sec. 60; Franklin *v.* Globe Life Ins. Co., 52 Mo. 461; Sumner *v.* Saunders, 51 Mo. 89; Bronson *v.* Chappell, 12 Wall. 681; DeBaum *v.* Atchinson, 14 Mo. 543; Fatman *v.* Leet, 41 Ind. 133; Medbury *v.* New York & Erie R. R. Co., 26 Barb. 564; Merchants' Bank *v.* State Bank, 10 Wall. 649.

LEWIS, J., delivered the opinion of the court.

The petition charged defendants as indorsers of a promissory note for $370, executed in their favor by M. B. Lindsay, and by them indorsed and delivered to plaintiff. The indorsement was thus: "Diebold & Kienzle, by Geo. F. Cochnower, Agt. D. & K." The sworn answer of defendants denied all knowledge of the note or of its indorsement; denied that they had ever delivered it to plaintiff, or that it was ever indorsed or delivered by any person having authority from them so to do. A reply was filed, alleging that the indorsement was made by an agent duly authorized by defendants for that purpose. The cause was tried before a jury, whose verdict was for the plaintiff.

It appeared from the testimony that defendants were manufacturers of iron safes, in the city of Cincinnati, and that George F. Cochnower was their agent, having a store or salesroom for their wares in St. Louis. The testimony was full of conflicting statements touching the extent of the agent's powers. Cochnower testified that he was defendants' "general agent, with full powers, except the power of making notes." He said, further: "I was held out, and did in reality have full power, to transact all the business of Diebold & Kienzle in St. Louis, the same as if it were my own. The only restriction upon me was that I could not make notes. * * * I signed checks, indorsed checks, notes and drafts, and gave receipts, all with the personal knowledge of the said firm, and without any objection from them. * * * When I took notes, they were always made payable to the order of Diebold & Kienzle, and, if

necessary, I had them discounted by indorsing them with the name of Diebold & Kienzle, by me as their agent. All this I did with their knowledge, and this was the usual course of my business." The witness identified the note in suit as one which was so indorsed and discounted by him in the course of his business as agent, and stated that he had accounted for the proceeds in his monthly statement to his principals. The defendants also testified. Each of them declared that Cochnower's agency was limited to the sale of safes and the soliciting of orders, and each flatly and specifically contradicted every statement of his that was inconsistent with that limitation. They denied that any report was ever made to them of the note in suit, or of the transaction in which it was given, or that any proceeds of either had ever come to their hands. These general statements were aided, respectively, by testimony of corroborative tendencies on both sides. It is unquestionable that, if the plaintiff's testimony was all true, he was entitled to recover. It is equally unquestionable that if, on the other hand, the defendants' testimony must be held conclusive, the verdict was wrong. Such a comparison and its results will, in all cases, furnish a final test of the jurisdiction of an appellate court over the question at issue. This direct conflict between the material and controlling testimony adduced on one side and that upon the other infallibly makes the jury the tribunal of last resort, upon the question of fact, and closes the avenues of reviewing inquiry against an appellate court. Our reports teem with judicial rulings to this effect, repeated again and again; and they must, doubtless, yet be repeated, as long as appeals and writs of error shall be found in our system of jurisprudence. If counsel, in the strong impulses of faithful advocacy, could oftener pause to apply the test here indicated to their records of testimony, there would be, I think, a very large reduction in the number of appeals, and of twice-disappointed litigants. In the present case

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we are furnished with an exhaustive argument upon the law of agency, demonstrating with conclusive force that the defendants were entitled to a verdict upon the theory of facts which their evidence tended to establish. But, unfortunately, its application here is completely superseded by the jury's disposition of that theory. Their verdict has placed it beyond our reach for any purpose.

Defendants saved exceptions to the admission of testimony showing transactions previous to the one in controversy, wherein the agent Cochnower had obtained similar discounts, indorsing the names of his principals upon notes which were afterwards paid at maturity. It is true that this testimony was valueless without a further showing that the defendants knew and approved of those transactions. But a party is compelled to develop his chain of testimony link by link. This was merely a link, but it was a material one, and therefore could not be excluded because the others were not exhibited in the same moment. Connecting it with the testimony of Cochnower, and with other facts distinctly proved, we cannot perceive how its introduction could possibly have prejudiced the defendants' rights.

It is insisted that the court erred in admitting a letter appearing to have been written by defendants to Messrs. Hermann & Co., stating that their St. Louis agent, Cochnower, "had the right to discount paper taken from customers in payment for safes," but could not "raise money on notes given by him in the firm name." The testimony was clearly competent and admissible. A witness who had had a business correspondence with defendants testified that this letter was in the same handwriting with those which he had received, and appeared to have been written by the person who conducted the defendants' business correspondence. It was immaterial that the letter was not addressed to the plaintiff, or that he had not acted upon any knowledge of its contents. Its competency was apparent in the fact that it contained an admission made to a third

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party against the interest of the party making it. When, afterwards, the writer of the letter, admitting his general authority to correspond for defendants, yet expressed some doubt of his right to write the letter in question, this created no necessity for excluding the testimony. It still left the question of his authority in that special instance to be determined by the jury.

The court instructed the jury, for plaintiff, as follows:

1. "If the jury believe from the evidence that defendants, Diebold & Kienzle, knowingly allowed George F. Cochnower to indorse with their firm name, and to discount notes taken in the way of business, and failed to notify the public that he was not authorized so to do, they are bound by such indorsements, and the jury must find for plaintiff, if they also believe that the note sued upon was so taken in the way of business, and indorsed and discounted.

2. "If the jury believe from the evidence that Cochnower was the general agent for defendants, Diebold & Kienzle, and was authorized to indorse and discount notes taken in the course of business, and that he did so indorse and discount the note sued upon, in pursuance of such agency, they will find for plaintiff."

We can find no fault in these instructions. That they contain no more than the plaintiff was entitled to is so manifest as to admit of no argument. Defendants, assuming that there was no possible method by which they could have notified the public of Cochnower's lack of authority to discount their notes, object on that account to the first instruction. There is nothing in the objection. Means of communication with the public were on every hand, and, if all others were deemed inadequate, they could have placed the matter beyond dispute or inquiry by a dismissal of their agent. That the defendants "failed to notify the public" of the fact supposed is but another way of saying that they tacitly assented to the indications of the contrary.

For defendants the court instructed the jury that it was

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incumbent on the plaintiff to show that Cochnower had authority to indorse for his principals the note sued on; that his authority to transact the business of defendants did not necessarily imply a power to indorse notes, etc.; that the agent's authority was limited to the particular business in which he was employed, and the principals were bound only for such acts as came within the scope of his employment. The court refused to give an instruction, asked by defendant, to the effect that "authority given to an agent to discount at one place, or with one person, does not imply the authority to discount at another place, or with another person." This action of the court was proper. There was no evidence of authority in Cochnower to discount at any one place, or with any one person, that did not equally tend to prove his general authority to discount at all places, and with all persons, as occasion might require.

The case was fairly tried in all respects, so far as we are informed by the record. All the judges concurring, the judgment is affirmed.

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JOHN C. MILLER, Plaintiff in Error, *v.* EBERHARD ANHEUSER, Defendant in Error.

May 16, 1876.

1. Where the city charter provides that the council shall construct sewers where they deem it necessary, the passage of an ordinance to construct a sewer is conclusive as to the necessity for the sewer.
2. The fact that a portion of the sewer connecting it with the main sewer runs through property of defendant not condemned for sewer purposes is no bar to a recovery on the special tax bill against defendant for the portion of the sewer built on that part of his premises which had been regularly condemned.

ERROR to St. Louis Circuit Court.

Reversed and remanded.

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Jecko & Hospes, for plaintiff in error, cited: New York & Harlem R. R. Co. *v.* Mayor of New York, 1 Hilt. 562; Mutham *v.* Sharp, 15 Barb. 193; Fay *et al.* *v.* Mayor of Boston, 15 Pick. 243; Young *v.* City of St. Louis, 47 Mo. 492; McCormick *v.* Patchin, 53 Mo. 33; Giboney *v.* City of Cape Girardeau, 58 Mo. 141.

Slayback & Haeussler, for defendant in error.

BAKEWELL, J., delivered the opinion of the court.

This is an action to subject certain property in the city of St. Louis to the lien of special tax bills, issued by the city of St. Louis, for the construction of a sewer, under authority of ordinances 8002 and 8060.

There are three counts in the petition, upon as many tax bills.

The answer admits that defendant owns and is in possession of the property sought to be charged, and denies all other material allegations of the petition, and then sets up as affirmative matter of defense that, by the charter of the city, of March 4, 1870, it is provided (art. 8, sec. 12) that the City Council shall cause sewers to be constructed in any district wherever a majority of the property-holders resident therein shall petition therefor; that in May and June, 1872, among other property-holders who resided within the alleged Arsenal Sewer District No. 5, were James Ruane, the defendant, C. Stone, and B. Heil; that in May, 1872, the ordinance set up in the petition as that under which said sewer was constructed was introduced into the City Council, on petition of said Ruane, one S. B. Kellogg, and one David Nicholson, and no others, of whom two never resided in the said sewer district; that said ordinance was passed in June; that a majority of property-holders resident in said contemplated sewer district never signed and consented to said petition, and that, therefore, said ordinance is void; that said sewer was not necessary for sanitary or other purposes, and, as constructed, is of no use to defendant, his property, or other residents in said sewer district, of all

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which plaintiff had notice; that said sewer, as constructed, is not upon a public highway, as required by law, but on the private property of defendant. The same answer is made to each several count.

The reply denies the new matter in the answer. On the trial it was admitted that the tax bills filed with the petition were genuine, and duly signed by the city engineer, comptroller, and special tax clerk, and that defendant, when the work was done, and since, was and is the owner in fee of one undivided half of the property described in the bills. The bills were offered in evidence, and plaintiff rested.

Defendant then offered evidence tending to prove all the affirmative matter set up in his answer, and that the sewer was of no benefit to defendant or his property, and that plaintiff had knowledge of all these facts. Plaintiff objected to all this evidence as incompetent, irrelevant, and immaterial. The objection was overruled, and plaintiff excepted. It was then agreed that the facts so offered in evidence should be considered as proved.

Plaintiff then admitted that thirty-one and eighty-three one-hundredths lineal feet of said sewer is on private property of defendant, and that the sewer would be useless without that part, and that said property has never been condemned, nor has compensation been offered for it; and that this part of the sewer is described in two of the bills sued on, numbered 4,109 and 4,117, and described in second and third counts of the petition, and is a connecting part, lying between Arsenal street and the parts of the sewer charged for in the first count. The public sewer is on Arsenal street, and the district sewer charged for in this suit is in the alley running south from Crittenden towards Arsenal street. It was admitted that the private property in question, through which this sewer was run to reach the public sewer on Arsenal street, lies between the end of the alley and Arsenal street. It was also admitted that the city engineer, unless authorized by the city charter and

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ordinances 8,002 and 8,060, had no authority to cause said sewer to be constructed, or to make the contract with plaintiff set out in the petition. The two ordinances were then put in by consent, and it was admitted by defendant that the portions of the costs, as assessed against the several lots of ground, were the just proportion of the whole costs chargeable, if the ordinances and contract are valid.

Defendant then rested.

The court gave the following instructions, at the instance of plaintiff:

"The fact that a part of the sewer is built through or on the private property of the defendant, and that the whole sewer would be of no use without the part so on private property, is no defense to the first count of the petition, it appearing from the facts of the case that the tax bill sued on in first count of the petition does not include the cost of any part of the sewer so on private property.

"The fact that a part of the sewer is built through or on the private property of the defendant, and that the whole sewer would be of no use without the part so on private property, is no defense to the second count of the petition."

The court also instructed that the same fact is no defense to the third count.

The court refused the following instructions, asked by plaintiff:

"The evidence offered by defendant to prove upon whose petition the ordinances mentioned were passed, and what and how the City Council was induced to pass them, and that said sewer so provided for in the ordinances was not necessary in fact, and that defendant's property was not benefited by such sewer, and the plaintiff's knowledge of these facts, is immaterial and incompetent, and will not be considered in finding a verdict; and the facts so offered to be proven would, if proven, be no defense to either count of plaintiff's petition."

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Thereupon the plaintiff took a nonsuit; and, the court refusing to set the same aside, all exceptions having been duly saved, the plaintiff brings the cause here by writ of error.

Section 12, of article 3, of the Revised Charter of the City of St. Louis, approved in 1870, provides "that the City Council shall cause sewers to be constructed in any district, whenever a majority of the property-holders resident therein shall petition therefor; or whenever the City Council may deem it necessary for sanitary or other purposes."

It is admitted that a majority of the property-holders did not petition for the sewer; that it was not necessary for sanitary or other purposes, and that it was of no benefit to defendant, the other property-holders resident within the district, or to his or their property.

The question is not whether the sewer is necessary for sanitary purposes in the opinion of the parties to this suit, the witnesses, the counsel, or the court, but whether it was necessary in the opinion of the City Council. The ordinance directing the construction of the sewer settles that question. The fact that the Council passed the ordinance was sufficient to show that the exigency had arisen. It was not essential that they should so declare in express words. *Young* v. *City*, 47 Mo. 493. The question of the necessity of the sewer for sanitary or other purposes rests wholly with the Council, and is not under the supervision or control of the courts. *McCormack* v. *Patchin*, 53 Mo. 35. The courts are bound to assume that, where a discretion is vested in a municipal body exercising functions of a legislative character, good reasons existed for the adoption of the regulation. *Harlem R. R. Co.* v. *Mayor of New York*, 1 Hilt. 588.

In short, it is the duty of the Legislature to see that no power is given to municipal corporations which may be

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abused. The judiciary have no revision of legislative discretion on this subject, and have no responsibility whatever for its exercise. *Giboney* v. *Cape Girardeau*, 58 Mo. 143.

It is said that, inasmuch as the portion of the sewer, thirty-five feet in length, connecting it with the main sewer of the city, was illegally made over private property, and as the remaining portion of the sewer is useless without the outlet, it is manifest that that portion of the sewer for which alone plaintiff can recover cannot be used for sanitary purposes, or any purposes whatever.

But this is not so. For any portion of the sewer constructed on private property, not condemned for the purpose according to law, the owner of the tax bill cannot recover. When the sewer ran through the private land of defendant, the city manifestly had no right to proceed until the same was condemned, or the consent or relinquishment of the owner obtained. *City, to use of Lancaster*, v. *Armstrong*, 56 Mo. 300. But the thing is done. The sewer is made. The outlet is constructed, and the connection with the main sewer established. Plaintiff may never be paid for this work—that is his affair—but he cannot undo it. The sewer is not blocked up; the city has allowed the connection with the outlet to be established; the end of the sewer runs through the land of defendant, and no one can tear it up without committing a trespass on his land.

The instruction set out above, as asked by plaintiff and refused, should have been given, and the evidence referred to in that instruction was incompetent, and should have been excluded. The judgment of the Circuit Court is reversed and the cause remanded. The other judges concur.

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THOMAS B. NORTH *et al.*, Guardian, etc., Appellants, *v.* THOMAS A. WALKER, Executor, etc., Respondent.

May 16, 1876.

1. The executor of a deceased person may, especially with the sanction of the Probate Court, make a valid contract for the extension of the time of payment of a debt owing by decedent, and a contract that, in consideration of the payment of interest by the executor, an extension of time for the payment will be given by the creditor, is valid.

2. There may be circumstances which will render something less than an absolute strict compliance with the requirements of the statutes a sufficient exhibition of a demand for allowance against the estate of deceased.

APPEAL from St. Louis Circuit Court.

Reversed and final judgment.

Davis, Thoroughman & Warren, for appellants, cited: Wag. Stat. 104, secs. 15, 16, 17, p. 74, sec. 29; Coleman *v.* McClure, 47 Barb. 206; Cartright *v.* Green, 47 Barb. 47; Harrison *v.* Jones, 33 Ala. 258; Puckett *v.* James, 2 Humph. 565; Cheseman *v.* Kyle, 15 Ohio, 15; Herman on Estop. secs. 418–420; Wells *v.* Miller, 45 Ill. 33; Smarr *v.* McMaster, 35 Mo. 351; Kees' Exr. *v.* Kees, 2 Gratt. 128; Boyd *v.* Ogelsby, 23 Gratt. 674; Williamson *v.* Anthony, 47 Mo. 299; Williams on Ex. 1196; Tevis *v.* Tevis, 23 Mo. 258; Will *v.* Wright, 32 Ia. 451; Stiles *v.* Smith, 55 Mo. 368; Gansevort *v.* Nelson, 6 Hill, 389; Mason *v.* Tiffany, 45 Ill. 392; Johnson *v.* Corbett, 11 Paige, 265; Flinn *v.* Shackleford, 42 Ala. 202.

Krum & Madill, for respondent, cited: 1 Wag. Stat. 86, sec. 19; Ib. 102, secs. 2, 5, 6, 8; Wiggins *v.* Lovering, Admr., 9 Mo. 262; Montelius *et al.* *v.* Chouteau's Admr., 11 Mo. 237; Tevis *v.* Tevis, 23 Mo. 256; Richardson, Admr., *v.* Harrison, Admr., 36 Mo. 96.

GANTT, P. J., delivered the opinion of the court.

Appellants sued respondent to the June term, 1872, of the St. Louis Circuit Court, alleging the execution by Isaac Walker, March 14, 1867, of his note for $24,000, three

years after date, with 10 per cent. after maturity; that he executed, also, to secure the note, a deed of trust to one Merry, trustee: that Walker died in October, 1868, leaving a will, of which defendant was executor; that interest on the note was paid up to September 14, 1871; that the sum of $17,226.21 was realized, on September 18, 1872, by the sale of specific security; and plaintiffs ask judgment for the remainder of the note and interest.

The answer ignores the execution of the note; admits the grant of letters; sets up that, within eight days thereafter the executor published notice that such letters had been granted to him, and requiring all persons to present their claims against decedent for allowance on pain of being barred; that the demand upon said note accrued on March 17, 1870, and was not exhibited to the executor, nor suit brought thereon within two years from the day of the publication of the said notice. For a further defence, the executor, setting up the same introductory matters as in the previous answer, alleged that the note accrued March 17, 1870, and was not exhibited to the defendant as executor, nor presented to the Probate Court for allowance, nor was suit brought thereon within three years after the granting of said letters testamentary.

Plaintiffs filed a replication ignoring the publication, admitting that the demand had not been presented to the Probate Court, nor suit brought on it within two years after publication of notice, but alleging that it was exhibited to the executor, as a claim against the estate, within said two years and within two years after the grant of letters testamentary, and that suit was brought upon it in the Circuit Court within three years after the demand accrued.

2. For further replication, plaintiffs, ignoring as aforesaid, alleged that the said claim was exhibited to Thomas A. Walker, executor, etc., within two years after the claim accrued, and within three years after letters granted, and that suit was brought in the Circuit Court within three

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years after the demand or claim arising from said note accrued.

3. For further replication they say that, on February 8, 1870, at the request of T. A. Walker, executor, who agreed to pay therefor 9 per cent., an extension was made, for one year, of the said note, from March 14–17, 1870. This agreement was made in writing, and is produced and filed with the reply. That, on March 28, 1871, the note was again extended for one year; this agreement was also in writing, filed with the reply. And plaintiffs set up these agreements in bar of the matters alleged in the answer.

To the third matter set up in the replication defendant demurred, and the court sustained the demurrer on April 13, 1874. Afterwards, at the April term, 1875, the court, on trial, gave judgment for the defendant on the remaining issues. A motion for a new trial was overruled; there was an appeal to the general term, where the judgment was affirmed, and the case comes before us by appeal, the record not having been filed in the office of the clerk of the Supreme Court until December 17, 1875.

By the bill of exceptions it (rather superfluously) appears that the plaintiffs excepted to the sustaining of the demurrer of the defendant to the third matter of the replication. That at the hearing the note was read; that the inventory of the estate of Isaac Walker was read, which, among other things, contained a description of the land at the northeast corner of block 26, of the city of St. Louis, declared to be incumbered by a deed of trust to secure the payment of $24,000. Other pieces of land were mentioned in the inventory, most of them incumbered, but having no discernible connection with the present note or case. The inventory covers several pages.

A payment of interest was made by Thomas A. Walker, executor of Isaac Walker, deceased, on September 17, 1870, and the note was renewed for one year from March 17, 1870. The payment was shown by a receipt signed by

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plaintiffs, not in a representative capacity, but as "Thos. B. North and Samuel T. Adams." Another receipt for interest, dated September 18, 1871, for six months, ending September 17, 1871, and signed in like manner, was shown. Then follow two *unsigned notes or blanks*, dated March 14, 1867, each for $960, payable, one at twenty-four and the other at thirty months after date, to the order of Thomas B. North and Samuel T. Adams, guardians, etc., and then come some unexplained and unsigned memoranda, the meaning of which we can only conjecture. Then comes the agreement, dated February 8, 1870, between these guardians and Thomas A. Walker, executor of Isaac Walker, for the extension of the note for one year from March 14, 1870, at 9 per cent. per annum; then a receipt from Thomas B. North and Samuel T. Adams to Thomas A. Walker, executor of Isaac Walker, dated February 28, 1871, for $1,080, described as semi-annual interest on the principal note of Isaac Walker for $24,000, with an agreement in writing of the same date, signed by Thomas A. Walker, executor of Isaac Walker, for the extension of the note until March, 1872. Then was read the deed of trust by which the property at the corner of Oak and Main streets, in block 26, was conveyed to trustees to secure the payment of this note of $24,000. And Thomas B. North testified that, about four months after the death of Isaac Walker, he exhibited the note in question to Thomas A. Walker, executor, who said he knew all about it, and that it was all right; that he did not know whether it was necessary to present the notes to the Probate Court, but, if it were, he would appear and waive notice. Witness accordingly presented the notes to the Probate Court, the executor waiving all objections. The principal note was not then due. The judge said the claim was valid, but, as it was not due, it was unnecessary to make a formal allowance. The interest notes were paid as they fell due. (It should have been stated that the

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interest received on the loan, as appeared by the deed of trust, up to 1870, was 8 per cent. only.) In the spring of 1870, at the request of the executor, witness extended the note for one year, at 9 per cent., and the same thing was again done in 1871. On the 24th March, 1870, the executor procured and filed in the Probate Court, at the request of witness, a copy of the deed of trust, together with the agreement for the extension of the note. The property was sold April 18, 1872, realizing the sum credited on the note. The rest is wholly unpaid. But for the solicitation of the executor, who urged witness not to sacrifice the property of the estate, he would have sold the property immediately on the maturity of the note; and but for this solicitation, and the written agreements made and read in evidence, he would have made formal proof of the demand within two years after the death of Walker.

It was admitted that the executor duly published the notice of administration.

Plaintiffs asked the court to declare "that, if it should find from the evidence that Isaac Walker made his promissory note, dated March 14, 1867, due three years after date, secured by the deed read in evidence; that he died in October, 1868; that letters were granted on his estate December 10, 1868, and his executor duly published notice thereof; that on February 8, 1870, the plaintiffs presented said note and deed of trust to the executor as a demand against the estate; that the same were submitted to the Probate Court and allowance thereof not determined, and that plaintiffs and executor made a written agreement extending the time of payment of the note for one year, which was reported to and filed by said executor in the Probate Court, and filed the corresponding receipts also for the payment of interest, and on February 28, 1871, a similar written agreement was made and filed, and also receipts for interest, all of which were approved by the

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Probate Court, a certified copy of the deed of trust being also filed in said Probate Court, then said note was exhibited within the meaning of the statute."

2. "That if the executor had notice of the said claim, and that plaintiffs intended to exhibit the same for allowance to the Probate Court, and, in order to obtain time for the payment thereof and procure a postponement of the sale under the deed of trust, made the said agreements, and reported them to the Probate Court, and if plaintiffs, relying thereon, failed to present the claim and have it formally allowed until, etc., then the executor and his successor are estopped to set up such delay in bar of the claim."

Three other instructions, much to the same effect, were asked by the plaintiffs. They were all refused, plaintiffs excepting; and the court declared the law to be, if the executor duly published notice of the grant of letters to him in December, 1868, the plaintiffs' claim was barred.

Two questions are presented by this record, the determination of both of which in the negative appears to be necessary to the affirmance of the judgment of the Circuit Court. These are:

1. Had Thomas A. Walker power to make a valid contract, and did he make a valid contract, for the extension of the time of payment of the principal note for $24,000, secured by the deed of trust in this case?

2. Was there, at any time, any such exhibition of the demand as prevented the bar of the statute?

1. The circumstances of this case disclose the utmost good faith, the fullest merits, and, we also think, legal diligence on the part of the guardians of the minor children of Mr. North in the original contracting, the exhibition, and the agreement for the extension, of the demand, which is shown by the note sued on in this action. It appears by the inventory of the executor of Isaac Walker that the deceased, a man of large possessions, was also a borrower to a large amount. A great proportion of his St. Louis

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property was heavily incumbered, much of it by mortgages on which a high rate of interest was reserved. This note for $24,000 was apparently given for the full sum lent, and 8 per cent. interest only was reserved. Shortly after the death of Isaac Walker the claim was brought before the Probate Court, the executor waiving notice and admitting in the fullest manner the meritoriousness of the demand. The only reason why allowance was not formally made appears to have been that the court suggested that such an allowance was unnecessary, the note not being then due. It is true that the statute makes provision for the allowance of immature demands (1 Wag. Stat. 1872, p. 104, secs. 22 and 23), but the court appears not to have adverted to the last of the sections referred to; and, as to the first, to have rebated the claim at the rate of 6 per cent. per annum would have been disadvantageous to the estate of Walker; besides which, it is pretty clear that there were no means of present payment of the demand, had it been thus allowed at the March term, 1869. There seem to have been no such means in the hands of the executor, either in 1870 or 1871, for in each of these years the Probate Court was made acquainted with, and the judge seems to have sanctioned, the stipulation for the extension of the time of payment of this note, made in February, 1870, and repeated or renewed in February, 1871. The Probate Court would hardly have given to this arrangement the tacit sanction which, we think, clearly appears, if there had been in the hands of the executor any money applicable to the payment of this demand. These extensions of the note were both made before the note became due. The first was made before the maturity of the security, as originally contemplated by the deceased; the second before the expiration of the time for which it had been in the first place extended. Both of the extensions were made avowedly for the purpose of tiding over a period of depression in the real estate market, and to avoid a sacrifice of the property by a sale in

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1870 and 1871. It was supposed by the executor, who may be presumed to have exercised a sound discretion in the matter, that the depression in the price of real estate in this city (which, we may note as matter of history, dates from 1869) was but a temporary disturbance, and that a rally would be speedy and certain. No one who is mindful of the history of St. Louis from 1843 to 1869–70 would be apt to consider such a view injudicious. In that interval there had been, from causes the operation of which was more or less conspicuous, several periods during which a temporary check had been given to the value of real estate in this city and its neighborhood. In 1846, in 1849, in 1854, in 1857, in 1860–1–2–3–4 (a protracted time of gloom, caused first by the dread, and afterwards by the presence of, civil war), there had been these temporary checks. But from every such time of distress there had been a recovery which might be called triumphant. Not only had all the ground lost been regained, but a further advance—and generally in full proportion to the length of the period of stagnation—had been realized; and in 1870 an authentic census demonstrated such a growth of St. Louis in population and industry during the preceding ten years, notwithstanding all the obstacles to her progress, as her most sanguine friends scarcely ventured to anticipate. Under these circumstances the executor was well justified, we think, in believing that the interests of the estate under his charge would be promoted by deferring a sale of the specific security given for the payment of the note we are considering.

Whether his discretion, however, was wisely or unwisely exercised, is not a matter which we are called on to review. The really important inquiry is whether he had power to exercise such discretion at all. If he had such a power, then whether he exercised it auspiciously or inauspiciously for the interest of estate in his hands, cannot affect the validity of his action. That he possesses the power to negotiate and stipulate for such an indulgence as was here given

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does not seem open to dispute, since the decision of *Smarr* v. *McMaster's Admr.*, 35 Mo. 349. There is nothing in the later case of *Cape Girardeau County* v. *Harbison's Admr.*, 58 Mo. 90, that is not in full harmony with the earlier decision. An executor or administrator has no power to revive, by any word or deed of his, a demand against his decedent's estate which has been once barred. This is conceded and ruled in both cases. But that is not the point in the case at bar. At the time of making the agreements whereby the strong probability of great gain was secured to the estate of Isaac Walker, the validity and enforceability of the demand, the enforcement of which was temporarily suspended, were incontestable. There was no question of reviving an extinct claim. We are of opinion that the first question stated must be answered in the affirmative; and this disposes of the controversy. If the debt was continued so as to be non-enforceable against the estate of Isaac Walker until March 17, 1872, no laches can be imputed to the plaintiffs here. "*Contra non valentem agere nulla currit præscriptio*" is a maxim of law of undoubted application.

2. It may seem unnecessary for us to proceed to the consideration of the second question; but, if we had been compelled to decide the first inquiry differently, we should still be of opinion that the answer to the second would determine the reversal of this judgment. We are referred by appellants' counsel to the case of *Williamson* v. *Cooksey's Admr.*, 47 Mo. 299, and we are satisfied that it furnishes an answer to the present inquiry which is fatal to the affirmance of this judgment. This decision was made in a case arising under the law of 1855, of which the act ot 1865 (the same as that to be found in Wagner's Statutes of 1872) is a literal reproduction. It is familiar to the profession that the old law under which the case of *Tevis* v. *Tevis' Admr.*, 23 Mo. 256, was decided, was materially different from the statute of 1855. Compare secs. 4 and 5, p. 91, Rev. Code 1845, and secs. 4, 5, and 6, p. 153,

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Rev. Code 1855. Sec. 6 is perfectly new, and effects a total change in the law.

The judgment of the Circuit Court is reversed; and, there being apparently no reason to the contrary, final judgment for the appellants is given in this court. All the judges concur.

STATE OF MISSOURI, to use of GUSTAVE ROECKEL, Respondent, *v.* ROBERT JACOB, Appellant.

May 16, 1876.

1. A conveyance which is not invalid on account of fraudulent intent of the parties to hinder or delay creditors, may yet be so because made to the use of the grantor. Hence, it is error to instruct a jury that, if no such fraudulent intent exist, a deed is not void, as being made to the use of the grantor.
2. A parol agreement between the parties, contemporaneous with the execution of a trust deed or mortgage of merchandise, that the grantor may retain the stock and continue to sell in the course of trade, will vitiate the deed, as being made to the use of the grantor, with like effect as if such agreement appeared on the face of the instrument.
3. A suit on account of the taking of personal property held under a deed cf trust is rightly brought in the name of the trustee.
4. The better method of proving the value of personal property is by the statements of competent witnesses who can tell what it ought to bring in the market. But, if such testimony be not at hand, proof of a public sale of the property, actually made under legal procedure, may be admitted for the purpose.
5. The court cannot declare in an instruction what articles were sold, or not sold, at a public sale.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Jecko & Hospes, for appellant, cited: Laws App. (1872), 560; Peters *v.* Koch, 47 Mo. 582; Potter *v.* McDowell, 31 Mo. 62; Billingsby *v.* Bunce, 28 Mo. 547; Hall *v.* Webb, 28 Mo. 408; Reed *v.* Pelletier, 28 Mo. 173; State to use *v.* Tasker, 31 Mo. 445; State to use *v.* D'Oench,

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31 Mo. 454; Denny *v.* White, 10 Mo. 354; Greeley *v.* McNabb, 13 Mo. 596; Hofelman *v.* Valentine, 16 Mo. 393; Hasse *v.* Semp, 26 Mo. 394.

Gottschalk, for respondent, cited: Wag. Stat. 1000, sec. 3; Gibbons *v.* Gentry, 20 Mo. 468; Vorhis *v.* Langsdorf, 31 Mo. 451; State *ex rel. v.* Tasker, 31 Mo. 445.

Lewis, J., delivered the opinion of the court.

Plaintiff's usee was trustee in a deed of trust executed by one Bechtold, to secure certain promissory notes in favor of Joseph Schnaider, amounting to $700, for money borrowed in the same transaction. The deed covered a leasehold, together with the fixtures, furniture, and stock in trade of a dram-shop and beer saloon. Defendant Jacob was a member of the firm of Samuel Wainwright & Co., who, having obtained four judgments against Bechtold before a justice of the peace, caused executions to be levied on much of the personal property included in the deed of trust. Plaintiff's usee made claim under the statute, and defendants gave the proper bond, upon which, after sale of the property, this suit was brought. The verdict and judgment were for the plaintiff.

The property covered by both the deed and the levy consisted of tables, chairs, stoves, glasses, a clock, and a lot of wines and liquors. It appeared from the testimony of both the trustee and the *cestui que trust* that it was understood and agreed between the parties, when the deed was executed, that Bechtold should retain possession of the property and carry on his business as before, keeping the proceeds of his sales without any accounting therefor. One of the instructions given for plaintiff was as follows:

"The court instructs the jury that although they may believe that Bechtold executed the deed of trust with the intention to hinder, delay, or defraud his creditors, yet, if they also believe that Joseph Schnaider was not aware of such intention on the part of said Bechtold, at the time he took said deed, but that he, said Schnaider, took said deed

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of trust for the purpose and with the sole intention of securing himself for money loaned to said Bechtold, then the jury cannot find said deed fraudulent or void on the ground of fraudulent intention, or as being made to the use of said Bechtold."

So far as this instruction treated of the intentions of the parties, respectively, with their legal bearings upon the question of fraud in fact, it was free from objection. But the addition, "or as being made to the use of said Bechtold," had a direct tendency to mislead the jury. The invalidity of a deed on account of the intention to hinder, delay, or defraud creditors is one thing; its invalidity because of being made to the use of the grantor is another and a different thing. The instrument, so far as the first mentioned cause is concerned, may be absolutely free from taint; and yet, if made to the use of the grantor, it will be void against creditors, simply because the law declares that all such deeds shall be so, whatever the parties may or may not intend with special reference to such creditors. Hence, it could not follow, as the instruction seems to imply, that because there was no invalidating purpose to hinder, delay, or defraud, *therefore* the deed was not void "as being made to the use of Bechtold."

The Supreme Court of Missouri has repeatedly held that an agreement between the parties, contemporaneous with the execution of a deed of trust or mortgage conveying merchandise, to the effect that the grantor may retain possession of the stock and continue to sell in his accustomed course of trade, is a conveyance to the use of the grantor, within the meaning of the prohibitory statute. Such will be the effect, even though, as in the case before us, no suspicion of this agreement may arise upon the face of the deed. *State, to use Vouillaire*, v. *Tasker*, 31 Mo. 445; *State, to use Decker*, v. *D' Oench*, 31 Mo. 453; *Reed* v. *Pelletier*, 28 Mo. 177. The testimony brought the conveyance here under consideration clearly within the statutory inhibition, to the extent, at least, of the wines and liquors kept on sale. Yet

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the jury might infer from the instruction that the transaction was, in all its features, free from objection, provided, only, that the intentions of the parties, as to creditors, were in harmony with the conditions required by law.

Defendants object that the suit was wrongly brought to the use of the trustee, rather than of the beneficiary, who was the real party in interest. There is no force in the objection. The statute expressly recognizes in the "trustee of an express trust" a right to sue for the protection of his legal interest. Wag. Stat. 1000, sec. 3; *Gibbons* v. *Gentry*, 20 Mo. 468. The trustee is as fully authorized as any one can be to swear that he is "in good faith" the owner of the interest which he claims.

We find nothing objectionable in the instructions given for the plaintiff, except as above noted. They included merely the usual rulings—that fraud is not to be presumed, that the burden of proof is on the party attacking the good faith of the transaction, and that a debtor in failing circumstances has the right to prefer a creditor. The instructions given for defendants contained all that they were fairly entitled to, without the addition of those refused. It is true that the better method of proving the value of personal property is by the statement of competent witnesses who can tell what it ought to sell for in the general market. But, when such testimony is not at hand, a public sale actually made, as in the present case, is ordinarily admissible for the purpose. There would have been no propriety in telling the jury that there was no evidence whatever before them of the value of the property sold by the constable. Nor could the court have properly given the instruction which undertook to declare what specific articles were sold or not sold. Those facts were exclusively for ascertainment by the jury, from the evidence.

For error, in giving the first instruction at plaintiff's instance, the judgment must be reversed and the cause remanded. The other judges concur.

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GEORGE PRENDERGAST, Plaintiff in Error, v. EBENEZER RICHARDS, Defendant in Error.

May 16, 1876.

1. **Where, in a suit on special tax bill erroneously issued, there was judgment for defendant, this is not a bar to a suit upon an amended tax bill afterwards issued by the city engineer for the same work.**
2. **Where the contract on which the tax bill is issued embraces work outside the sewer district, the city engineer can compute the whole cost of so much of the sewer as was within the district, assess it as a special tax, and issue tax bills against the respective lots in the district.**
3. **A personal judgment cannot be entered against any one on a special tax bill, but an executor entitled to the possession of real estate is a proper party to a suit on a special tax bill affecting such estate.**

ERROR to St. Louis Circuit Court.

Reversed and remanded.

Matthew O'Reilly, for plaintiff in error, cited: Anderson v. Holland, 40 Mo. 600; Freem. on Judg. 276, sec. 259; Taylor v. Castle, 42 Cal. 371; Taylor v. Larkin, 12 Mo. 103; Bell v. Hoagland, 15 Mo. 360.

Lucien Eaton, for defendant in error, cited: Wilson v. Boughton, 50 Mo. 17; Freem. on Judg. secs. 249, 252, 253, 254, 256, 260, 272, 276; 1 Greenl. on Ev. secs. 522, 530, 531, 532; Verheim v. Schultz, 57 Mo. 326; Union R. R. Co. v. Traube, 59 Mo. 355.

BAKEWELL, J., delivered the opinion of the court.

This suit originated before a justice of the peace, to recover the amount of a special tax bill of $240.73, issued to the plaintiff by the city engineer of St. Louis, for the construction of district sewers in Compton avenue sewer district No. 10, dated February 7, 1874. There was judgment for defendant in the Circuit Court.

At the trial an agreed statement was submitted, as follows. It was offered in evidence by plaintiff, and he rested his case upon it:

"1. The signatures and genuineness of the special tax bill, ordinance, and contract named therein are admitted,

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saving to either party all exceptions to competency and relevancy of the evidence.

"2. It is admitted that plaintiff performed the work named in contract, in pursuance thereof, and had an assessment of the cost thereof made by the city engineer, and special tax bills issued therefor; but, as a portion of the work was outside the sewer district mentioned, the city engineer made a new and later assessment of the cost of the work, only including therein so much of the work as was done within Compton avenue sewer district No. 10; and the special tax bill sued on in this case is the one assessed and issued against the defendant under this last assessment.

"3. The work has been done only once, under contract No. 2,268, in said sewer district. Plaintiff only seeks in this action to recover for so much of the work under the contract as was done and situated under the sewer district aforesaid, and as constitutes defendant's *pro rata* of that part of the work and chargeable to his property, if the facts in evidence in the whole case establish such charge. This stipulation shall not preclude either party from offering any other and further evidence which may be competent or relevant at the trial."

The bill is dated February 7, 1874, is for $240.73, and is based on ordinance 7,550, and contract 2,268.

The defendant offered in evidence the record of cause 24,470, of the Circuit Court, between the same parties, in the same court, upon a similar tax bill, dated November 29, 1871, for $247.24, issued on the first assessment named in the stipulation, which embraced both the cost of the work done within said Compton avenue sewer district No. 10, and also cost of work done outside that district. In this suit there was a general and final judgment for defendant on June 8, 1873.

This evidence was objected to by plaintiff as incompetent and irrelevant, but was admitted, and plaintiff excepted.

The cause was tried before the court, sitting as a jury;

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judgment was for defendant, and, a motion for a new trial having been overruled, the cause is brought here by writ of error.

The following declarations of law, asked by plaintiff, were refused by the court, and plaintiff excepted:

"If the court, sitting as a jury, believe from the evidence that the special tax bill sued on in this suit, and offered in evidence by the plaintiff, is not the same as the special tax bill sued on in a certain cause in this court, being case No. 24,470, between the same parties hereto, and offered in evidence by the defendant, the judgment in said last mentioned case constitutes no bar to this action by the plaintiff against the defendant."

2. "If the court, sitting as a jury, believe from the evidence that the defendant is the owner of the property described in the special tax bill sued on in this suit; that said property is within the limits of Compton avenue sewer district No. 10; that the city engineer of the city of St. Louis assessed against said property, as its proportion of the cost of constructing sewers by plaintiff within said sewer district, the sum specified in said special tax bill, and that the same has not been paid, then the jury will find for the plaintiff the sum mentioned in said special tax bill, with interest thereon from its date, at the rate of 15 per cent. per annum, together with 10 per cent. damages, even though the jury may further believe from the evidence that the said city engineer had previously made another assessment against said property for the cost of constructing said sewers outside the limits of said sewer district, upon which said assessment a special tax bill was made out against defendant's said property, and delivered to plaintiff; that the plaintiff sued the defendant on said special tax bill, and that in said suit judgment was rendered in favor of the defendant because of said erroneous assessment."

The court gave the following declaration of law, at the instance of defendant, to which action plaintiff excepted:

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"The court declares the law to be that the judgment in favor of the defendant, in case No. 24,470 of this court between the same parties, read in evidence, is conclusive in favor of the defendant in this suit, and entitles the defendant to a verdict in his favor."

It does not appear that the special tax bill sued on was actually read in evidence, nor that it was formally offered; but it was a part of the record before the court, and is so referred to in the stipulations that it was manifestly regarded by counsel on either side as in evidence in the case, and was so considered by the court.

The plea of former recovery is liberally construed, and, as is said by Judge Napton, in *Union Transportation Co.* v. *Traube*, 59 Mo. 355, "If the subject-matter of the two suits is different, and the same question was not in fact litigated, and no evidence offered concerning it, the courts are disposed to allow the merits of the case to be investigated in the second suit. The form of action is immaterial, however, and, if the cause be the same, the judgment is conclusive."

The cause of action in these two cases was not the same. It was not the doing the work that gave the plaintiff a right to recover. The cause of action was the special tax bill. The first bill sued on was void, because issued on an erroneous assessment, embracing the cost of work done outside the limits of the sewer district. This suit is on a second bill, made upon a second, different, and, it is claimed, a correct assessment. In both cases it was necessary to prove the work was done. Of this a valid tax bill is *prima facie* evidence, but it was also necessary to show that a valid tax bill was issued. The question as to whether the work was done or not, does not appear to have been passed upon on the first trial; and there could be no estoppel unless there was a judgment on the merits of the case now at bar. The special tax bill now sued on constitutes at once plaintiff's cause of action and the *prima facie* evidence of all other

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facts entitling him to recover. As it did not exist when the former suit was instituted, it was not used as evidence in that cause; nor was it his cause of action there.

2. It is said that the contract on which the special tax bill sued upon rests embraced work outside sewer district No. 10, and was, therefore, *ultra vires* and void. If the contract embraced work outside the sewer district, it may well be that as to such work the contractor could not recover; but it by no means follows that a tax bill could not lawfully issue for the work actually done under the contract within the sewer district; or that the engineer could not, under the law, compute the whole cost of so much of the sewer as was within the district, assess it a special tax, and issue valid tax bills for it against the respective lots of ground in the district. The tax bill originally issued was erroneous in assessing for work outside the district; but, confessedly, the bill now sued on contains no charge for any work not done in accordance with law within the sewer district defined by ordinance or contract.

From what has been said it is manifest that, in our opinion, this case has been tried upon a wrong theory, and that the declaration of law given at the instance of defendant should have been refused.

The judgment of the Circuit Court is reversed and the cause remanded, to be proceeded with in accordance with this opinion. The other judges concur.

On a motion for a rehearing, BAKEWELL, J., delivered the opinion of the court.

On the hearing of this cause, owing to the pressure of circumstances, defendant's counsel not only submitted the cause without oral argument, but found himself compelled, in his written argument, to confine himself to little more than a brief statement of authorities. He has, since the decision of the cause, filed a motion for a rehearing, and he now submits, in support of his motion, a very carefully pre-

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pared statement and argument, which deserve, and have received, attentive consideration.

The city engineer made two assessments of the costs of certain sewer work. The first assessment was bad, because it embraced the cost of work done outside the limits of the sewer district. On the special tax bill first issued suit was commenced, and judgment was for defendant. The city engineer then made a second and correct assessment, and a new special tax bill was issued, the one filed as the cause of action in the present suit. The only defense is *res adjudicata*. It is not pretended that plaintiff was paid. It is not denied that the work was done, was worth the money, that defendant's property received the benefit of it, that the work was done only once, and that plaintiff in this action only seeks to recover for so much of the work under the contract as was done within the sewer district, and as constitutes defendant's *pro rata* of that part of the work chargeable to his property, if the facts in evidence establish such a charge.

The first assessment being erroneous, we think that the engineer had power to make a second and correct assessment. In *Kiley* v. *Cranor*, 51 Mo. 542, the tax bills were erroneously certified before the contractor had completed the work. The court held a substantial compliance with the law sufficient; that the street was macadamized, defendant's property received the benefit, and was chargeable with the amount assessed in the frontage. And in *Kiley* v. *Oppenheimer*, 55 Mo. 376, the court holds that a special tax bill may be certified anew, to correct errors in the certificate.

The object of this suit was to obtain a special judgment against the property benefited. The doing of the work would not entitle the plaintiff to this, nor to a judgment of any description. He must have a special tax bill. If the cause of action is that which it is necessary to state, in point of law, to support the action, then the tax bill is the cause of

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action. There is no privity of contract between plaintiff and defendant, and the only reason that a bill of this kind is admissible against the property of any one is the force of the statute which gives it this operation. It is held that no personal judgment can be rendered on such a bill. *Stadler* v. *Roth*, 59 Mo. 402. A mistake in the name of the owner does not vitiate the bill, and the law on the subject must have a fair and liberal construction, so as to give effect to the obvious purpose of the enactment. *City* v. *DeNoue*, 44 Mo. 137. If the work and labor done is the cause of the action, in a remote and improper sense, it is evident that the tax bill itself is the cause of action in a proper sense, as a promissory note is the cause of action in an action on a note. So that the cause of action in the first and second suit were not the same.

The issues in the two suits were not the same. The question as to whether the work was done and was worth the amount charged was an issue, we are told, in the first suit, because the general issue is always supposed to be pleaded before a justice, and nothing is admitted where a defense is made and no pleadings required by law. Now, sometimes several issues of law and fact are presented for the consideration of the court in the same proceeding, and all issues of law and fact necessary to be determined are completely disposed of by final judgment. But the pleadings alone will not determine, always, what is *res adjudicata;* for a matter may be *res adjudicata* not distinctly and specifically put in issue by the pleadings. The real question always is, what was tried and settled in the former suit? *Bigelow* v. *Winsor*, 1 Gray, 299. Two things are essential to *res adjudicata:* First, that the issue in the second action was a material issue in the first action, *necessarily determined by the judgment therein;* second, a former judgment on the merits. Now, that this work was not done, that it was not worth the amount charged, that it was not within the sewer district in which defendant's property lies, that the *pro rata*

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was not correct—none of these things were necessarily decided by the former judgment. Not only were they not necessarily decided, but we know, in fact, that they were not decided; and it is conceded in the present case that the work was done. An inspection of the record in the former case and the agreed statement in this case, shows that the old tax bill is incorrect, and that no recovery could have been had on it, according to law. The former judgment was, manifestly, not on the merits.

If the position that, after having once issued an erroneous tax bill for sewer work, the city engineer is *functus officio* as to that be correct, then, clearly, the plaintiff is not entitled to recover in this action, for the facts that he had done the work according to contract with the city and to ordinance, and that it is well done, and worth the amount charged, neither entitle him to a judgment against defendant nor to a special judgment against the property benefited. But if, as we think, the city engineer, having by mistake made an erroneous computation and assessment of the whole cost of the sewer by including some work not in a particular sewer district, may correct this error, and issue, as in this case, amended bills, a judgment for defendant on the first issued and erroneous bill does not conclude the party who did the work, unless it shall appear that the judgment was on the merits, and that the question of the value of the work, or some other question material to a recovery on the amended bill, was then tried and determined.

As to the right of the engineer to amend his assessment, it may be further said that, if the engineer follows the law and makes a correct assessment, there can be no need of more than one; but if he disregards the law, the first so-called assessment may be regarded as a nullity. Virtually, the correct assessment is the only one made, inasmuch as it is the only legal one.

The law itself makes the special tax bill the cause of action, provides that the suit shall be brought on the special

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tax bill, and that "each bill shall be a separate and distinct demand." Acts of 1870, p. 193, sec 1.

It is objected that the executrix is not a proper party, and that there can be no personal judgment against her. Under the law, as interpreted by the Supreme Court, there can be no personal judgment against any one in this action; the proceeding is to charge the real estate described in the bill. The executor, being entitled to the possession and control of realty until otherwise ordered by the Probate Court, is, however, not an improper party to a suit affecting it. Acts of 1871, p. 193, sec. 2. The motion for a rehearing is denied. All the judges concur.

CONRAD KEMPF, Respondent, v. WILLIAM ZEPPENFELD, Appellant.

May 16, 1876.

1. Where the evidence is conflicting and is submitted to the jury with proper instructions, the verdict will not be disturbed by an appellate court—appellate courts will not weigh evidence.
2. An instruction that, where defendant alleged a settlement, the burden is upon him of proving such settlement by a preponderance of testimony is not erroneous.
3. The testimony of experts as to the signature of K. to a paper is evidence from which the jury may determine whether the paper was executed by K.
4. A receipt in full, executed by plaintiff, is *prima facie* evidence of a settlement and payment in full.
5. Affidavits in support of a motion for a new trial on account of newly-discovered evidence will be disregarded if they show that nothing but gross negligence prevented the party from knowing, before the trial, the matters alleged to be newly discovered.

APPEAL from St. Louis Circuit Court.

Affirmed.

T. Z. Blakeman, for appellant, cited: Jaccard v. Davis, 43 Mo. 535; Wag. Stat. 1058.

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Jecko & Hospes, for respondent, cited: Scooeri *v.* Brashear, 46 Mo. 345; Barry *v.* Blumenthal, 32 Mo. 29; State *v.* McLaughlin, 27 Mo. 111; Philips *v.* Philips, 46 Mo. 607; Jaccard *v.* Davis, 43 Mo. 535; Miller *v.* Whitson, 40 Mo. 97; Goff *v.* Mullholland, 33 Mo. 203; Tilford *v.* Ramsey, 43 Mo. 421; Richardson *v.* Farmer, 36 Mo. 35.

GANTT, P. J., delivered the opinion of the court.

Kempf sued Zeppenfeld to the October term, 1872, of the St. Louis Circuit Court, alleging that at the special instance of defendant he had furnished the materials and laid for him 86 7-22 perches of rubble-stone masonry at $3.50 per perch, making $302.20, and laid for him 188 7-22 feet superficial measure of range-rock masonry at 65 cents per foot, making $122.55, or a total of $424.75, for which plaintiff asked judgment.

Also, Kempf alleged that on October 1, 1870, he did certain other work, and furnished certain other materials—that is to say, he furnished materials and laid 47 17-22 perches of masonry at $4 per perch, making $191; he furnished macadamizing to the amount of $25, sand to the amount of $20, lime to the amount of $11.25, did eleven days' work at $4 per day, making $44, furnished a laborer for three days at $2.75, making $8.25, paid for eight days' work of mason laying plank under foundation at $4 per day, $32, furnished a laborer for two days at $2.75, making $5.50, and again for a day and a half, making $4.02; total $341.02. All these materials were furnished and the work done at defendant's special instance and request; the work, labor, and materials were reasonably worth what was charged, but defendant has failed to pay, etc.

The defendant denied that plaintiff did certain work and furnished certain materials to the value of $420.75, or that the items of said account, or any of them, are correct, or that "defendant ever owed" anything to plaintiff on account of "anything" in the first count stated.

As "to the second pretended cause of action," defendant

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says it is not true that plaintiff did the work or furnished the materials in that count sued for, or any of them, or that said account or any item thereof is correct, or that defendant promised to pay the sum therein claimed, or that they were worth the sum of $341.02, *or any other amount.*"

Further answering, defendant says that on June 25, 1870, plaintiff, by his undertaking in writing, bound himself to do the stone-mason work at the colored school on Christy avenue, upon the same terms and conditions that were contained in a contract between defendant and the Board, etc., of St. Louis Public Schools, dated March 11, 1870, at the rate of $3.25 per perch; that thereupon plaintiff began the work, and that it is the same which is sued for in this suit; that about September 20, 1870, after all the work and labor had been done, plaintiff and defendant accounted respecting the same, and $150 was found to be due from defendant to plaintiff. This sum defendant paid to plaintiff in full satisfaction for "said demands." Wherefore defendant prayed judgment.

Plaintiff, in reply, denied "that he signed or executed said undertaking in writing mentioned in said answer and filed therewith;" denied that he obligated himself to do the said work at the rate of $3.25 per perch, and denied the accounting alleged on September 10, 1870, or at any other time; denied the payment of $150, or the taking by plaintiff of any such sum in full or in satisfaction of the demands sued for in this case. This reply was verified by affidavit.

The trial of the cause was begun on December 17, 1874, was continued through the 18th, and ended with a verdict, on December 19, 1874, in favor of plaintiff Kempf, with damages, as to the first count, in the sum of $251.72, and with damages, as to the second count, in the sum of $213.94. Judgment was thereupon given for $465.66 in favor of plaintiff. A motion for a new trial was filed within four days, and on May 10, 1875, it appears to have been over-

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ruled. On May 31, 1875, a bill of exceptions was filed, and the case went by appeal to the general term, which affirmed the judgment, and Zeppenfeld appealed to this court. The delays were all accounted for in the bill of exceptions. By this paper it appeared that at the trial plaintiff testified that, between June 1st and September 20, 1870, he, at the request of defendant, furnished the materials and laid 86 7-22 perches of rubble masonry at the colored school on Christy avenue, in this city, for the price agreed on, between plaintiff and defendant, of $3.50. In like manner he furnished materials and laid 188 17-22 feet, superficial measure, of range-rock masonry at 65 cents per foot, agreed upon by the parties before the work was begun. Afterwards, in September and October, plaintiff did for defendant, on same building, at his request, the work, and furnished the materials mentioned in the second count. The prices charged were reasonable and just. This was extra work. The work under his contract amounted to $424.75. The total of the two sums was what he sued for. On this defendant paid him $150, and to James Crinnion, quarryman, at the request of plaintiff, $200 more. This is all he ever paid to plaintiff, or any one for plaintiff.

On cross-examination plaintiff stated that these payments were made by checks; that he never requested defendant to pay the balance of Crinnion's bill; whether the balance of Crinnion's bill is paid plaintiff does not know. Plaintiff and defendant never had a settlement; they never had a written contract for the work. Plaintiff made a proposal in writing, but defendant never accepted it. Defendant told plaintiff to go and do the work. Plaintiff denied his signature to the paper annexed to the answer, and said it was a forgery. (This was the receipt mentioned in that pleading.) He also denied that defendant paid him the money mentioned in it; never went to defendant's house with Crinnion. He also denied his signature to the receipt, to Heisel, of $200, for stone mason's work on house on

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Gravois road; he said that it, too, was a forgery. He pronounced another receipt, purporting to be signed by him, dated August 1, 1870, for $20, to be a forgery; another receipt, dated February 20, 1870, for $50, for work on a house on Manchester road, he pronounced a forgery; and the same he declared in respect of a receipt, dated April 16, 1870, for work done on Hesse's place, and in respect of another receipt, dated February 20, 1869, for cellar work on Hesse's house, on Clayton road. He proceeded to say that he had done for defendant similar work to that here sued for; that he did work for him on Hesse's house, on the Clayton road, and on White's house, on the Manchester road, and also similar work since that charged for in this suit; built the foundations of Logan Dameron's houses for him, corner of Fourteenth and Washington avenue; always got his money without trouble, except in this case; gave him receipts in full for the work done on Hesse's house, and White's; don't know what defendant did with these; gave him a receipt, also, for the White job.

Plaintiff then called Yousal, who confirmed his evidence touching the terms on which he contracted with defendant; also Jacob Kempf and Harry Stiffen, who testified to the same effect; and George Siener, who testified that he had presented to defendant the account on which this suit was brought; that in the most deliberate manner he promised, in October, 1870, to pay it as soon as he got his money from the public schools, and afterwards professed not to know Kempf at all, but, when confronted with him (he tried to avoid meeting him), he denied owing him anything. He also called Milton Wash, secretary of the public schools, who testified that the defendant was the contractor for building the colored school-house on Christy avenue. He produced a voucher for the extra work done by defendant, containing an itemized statement of the whole matter, and the prices paid for each item. Defendant first made an account for a much larger amount, which was cut down.

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The plaintiff was allowed to read this account to the jury, against the exception of defendant, whose points were that it was incompetent to show either the quantity or value of the work done, and was calculated to prejudice the minds of the jury. This was the case ot the plaintiff.

The defendant examined John Moran, who testified that he knew Crinnion, who was then dead, and he proved the genuineness of certain memoranda purporting to be made by him.

He also produced as a witness Henry Chensler, who testified that the signatures of plaintiff, declared by him to be forgeries, were genuine. He did not see plaintiff write them; only judges from his knowledge of his handwriting. Witness was a bricklayer, and did not think himselt an expert in judging of handwriting.

Defendant then testified that, in May, 1870, plaintiff came to him to get a job; he had got other jobs from defendant; gave him the job of the colored school-house, on Christy avenue; told him to bring in a bid for it, telling him to find some one to do the range-work cutting. He brought Yousal, and also his bid; had a talk about the range-work, and it was verbally agreed they were to cost 30 cents per foot in the rough, 30 cents for dressing, and 5 cents for laying, making 65 cents for dressed stones laid in the building; "told him to go on by my direction;" he never went by my direction; took an entirely different course. About that time I got a contract for Logan Dameron's house; made an agreement with plaintiff about it; then agreed that stone work in the school-house, should cost $3.25 per perch, and that of Dameron's house $3 per perch. He fell 25 cents on the school-house, in consideration of getting the other job. Witness then positively, and in detail, testified to the settlement in September, and the payment of $150 in full of the balance struck. This balance was reached by defendant paying Crinnion $254.50, at Kempf's request, and crediting defendant with payments

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already made to plaintiff. At this settlement no one was present besides plaintiff, defendant, and Crinnion. Defendant testified that the receipt of that date was signed by plaintiff in his, defendant's, presence. He also testified to the genuineness of the other signatures denied by plaintiff, and denied, in the most positive manner, that he owed plaintiff one cent.

On cross-examination he said that he was a carpenter and builder; that he did not write plaintiff's name to any of the papers produced; that he wrote the body of the papers, but plaintiff signed them.

Casmer Heisel testified that the signature of plaintiff to the receipt for rubble masonry on Block's house, on Gravois road, was genuine.

George Otto testified, contradicting, in part, the statement made by Siener.

Philip Stock testified that as an expert he would say that the same person wrote the acknowledged and unacknowledged signatures of plaintiff's name.

D. A. Sutton and William E. Wagner testified to the same thing; the latter said he was not an expert as to German handwriting, and that the body of the receipt, dated September 10, 1870, and the signature were written in the same hand.

This was all the evidence. The court declared the law as follows, for the plaintiff:

"The defendant is not entitled to any credit for money paid to Crinnion, on account of stone work furnished, unless said money was paid by defendant with plaintiff's consent.

"If the jury believe from the evidence that the plaintiff did the work set out in the first count of plaintiff's petition, and that the same was done under contract or agreement, they will find for plaintiff in such sum as from the evidence he is entitled to; and if the jury further find that the plaintiff furnished the materials, and did the extra work set

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forth in the second count of said petition, or any portion of said work, they will find for the plaintiff on that count such sum as from the evidence they shall believe said work and materials were reasonably worth, said findings, however, to be credited with such sum or sums as the jury may believe from the evidence were paid on account of said work to plaintiff, or on his order, or to James Crinnion with his consent.

"The jury are instructed that the burden of proving a settlement or payment rests upon the defendant, and the defendant must establish the same by a preponderance of testimony."

To all these instructions defendant excepted. At defendant's request the court instructed as follows:

"That the testimony of experts, in relation to the signature of Kempf to the different papers read in evidence, is competent evidence from which the jury may infer as to whether or not said Kempf did execute said papers.

"That if they believe from the evidence that plaintiff executed the agreement read in evidence, and did the work under said agreement, then the jury cannot allow anything more for the work specified in said contract than the prices therein mentioned.

"And if the jury further believe that afterwards a settlement was had between plaintiff and defendant in this case, and that said plaintiff, in pursuance of said settlement, did accept a certain amount as payment or settlement in full of all work, then plaintiff cannot recover.

"That if they believe from the evidence that plaintiff executed and delivered to defendant the receipt in full read in evidence, then the jury will consider said receipt as *prima facie* evidence of a payment in full.

"That if they believe from the evidence that any witness in this case has willfully sworn falsely to any material matter, then they are authorized and may reject the whole of the testimony of such witness."

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After verdict for plaintiff, defendant moved for a new trial, assigning as reasons:

1. The admission of the voucher produced by Milton Wash.
2. Because the court improperly instructed the jury.
3. Because the verdict was against evidence.
4. Because of newly-discovered evidence.
5. And because the damages were excessive.

An affidavit by defendant, and several by other persons, were filed in support of the motion.

1. We find no error in this record. The evidence was contradictory, but the jury are the judges of the credibility of witnesses, and they have decided in this case for the plaintiff, upon a fair presentation of the issues, with appropriate instructions. The genuineness or forgery of the signature of the plaintiff to the various papers produced was one of the principal points of dispute. On this issue plaintiff and defendant contradicted each other flatly. The defendant adduced several witnesses to support his theory of the matter, some of whom testified so as to strengthen, and others so as to weaken, that theory. We perceive no reason for granting a new trial, so far as the instructions are concerned; and it is needless to say that we will not attempt to weigh the conflicting evidence.

2. We do not think that the court erred in admitting the testimony of Wash, as to the prices paid for work, to the defendant, by the Board of, etc., Public Schools. The inquiry was as to the quantity, price, and value of certain work done at the colored school-house on Christy avenue. It appeared that defendant, the person who did this work for the schools, had, in the first place, made out an account for this work at one price, but subsequently settled for it at a much less price. Why this settlement was not good evidence, as an admission by defendant of such quantity, price, and value, we are unable to see.

3. The reasons for a new trial, shown by the affidavit filed

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after the verdict, are wholly insufficient. The defendant swears that *he had discovered since the trial* that the plaintiff "is a person of no moral standing or credit in the community in which he lives;" that his reputation for truth and veracity amongst those who know him is so bad that his credit can be impeached, and he himself shown clearly to be not entitled to be believed under oath; that affiant did not know this fact at or before said trial, and did not learn it until afterwards, when several persons volunteered to tell him of it;" and if a new trial be granted him he promises to demolish plaintiff's character completely. The defendant goes on to declare himself surprised by the denial of plaintiff, under oath, of his signature to the receipts which defendant produced; he admits that, forasmuch as plaintiff had denied under oath, in his reply, that he had signed the contract set up in defendant's answer, he (defendant) "partly feared" that he would also deny his signature to the receipt in full; but defendant did not expect that he would deny the genuineness of the other papers, etc., and that if a new trial be given he will make full proof, etc. Defendant also promises in that event to impeach the credit of Siener, one of plaintiff's witnesses. The affidavits of several persons are filed, impeaching the credit of the plaintiff, and of one impeaching the credit of Siener.

We are not in the least surprised that the Circuit Court disregarded these affidavits. It is a familiar rule that the strength of the whole chain must be tested by that of any link of it; and it is manifest that the link to which our first attention is naturally and necessarily drawn will not endure the slightest strain. The defendant had been for years acquainted with plaintiff; had for years employed him to do work; was in the same general line of business with him; produced at the trial several witnesses, who testified that they had known plaintiff intimately for ten years or more; had been warned, in the most authentic manner, that

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a paper on which he relied for his defense was by the plaintiff declared to be a forgery. But he is not ashamed to declare himself to have been, until after the trial, unacquainted with the estimate which those who knew him had of the truthfulness of the plaintiff, and to have been surprised at his denial of the genuineness of other papers held by the defendant. Defendant produced several witnesses to prove that these denials of the plaintiff were false—some of them, indeed, testifying in a manner that must have disappointed him who called them. He was, then, not only aware of the issue made, but had prepared to meet it. If the present were the first occasion when an unsuccessful party sought to obtain a new trial on the ground of surprise and newly-discovered evidence it would furnish an excellent illustration of the rules established for refusing such applications. These rules are laid down in many cases cited by the counsel for respondent from the reports of our own Supreme Court. It is unnecessary to refer to them particularly. They are familiar to the bar, and their lesson is unmistakable. The judgment of the Circuit Court is affirmed, all the judges concurring.

OCCIDENTAL INSURANCE COMPANY, Plaintiff in Error, *v.* JOHN L. GANZHORN *et al.*, Defendants in Error.

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May 16, 1876.

1. As a general rule a party cannot, after securing the benefits of a contract with a corporation, escape its obligations by denying the existence of the corporation; nor can one who, by taking stock, voluntarily assists in the organization, afterwards refuse to pay for such stock on the ground that the corporation was not legally established. But no action can be maintained against one who, acting in good faith, was induced by fraudulent representations to give his note as stock subscriber to a sham corporation, set on foot without authority of law.

2. Where it appeared that the articles of association of an insurance company called for a capital stock of $100,000, declaring that the whole was already

taken by the original corporators; that part of the alleged subscriptions of stock were fictitious, and exhibited for the purpose of inducing *bona fide* subscriptions; that no affidavit was appended to the articles, as required by law; that, when the license was issued, the percentage required by law had not in fact been paid in, and that the stock note sued on was given by defendants in ignorance of these facts, and upon the faith of representations to the contrary, it was not error to instruct that, upon the whole evidence, the plaintiff could not recover.

ERROR to St. Louis Circuit Court.

Affirmed.

Slayback & Haeussler, for plaintiff in error, cited: Ohio & Mississippi R. R. Co. *v.* McPherson, 35 Mo. 13; Camp *v.* Bryne, 41 Mo. 529; 2 Cranch, 449; St. Louis Mutual Fire Ins. Co. *v.* Boeckler, 19 Mo. 135; Redf. on Rys., secs. 47, 49, 53, 54; White Mountain Road *v.* Eastman, 34 N. H. 124; Ang. & Ames on Corp., secs. 635, 636; Upton *v.* Hansborough, 3 Biss. 417; National Park Bank *v.* Nichols, 2 Biss. 146; Boland *v.* Whitman, 33 Ind. 65; Central Plank Road Co. *v.* Clemens, 16 Mo. 359; Stanton *v.* Wilson, 2 Hill, 154; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Sawyer *v.* Hoag, 17 Wall. 610; State *v.* Kupferle, 44 Mo. 154; New Haven & Derby R. R. Co. *v.* Chapman, 38 Conn. 56; Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248.

H. B. Lighthizer, for defendants in error, cited: Oldtown & Lincoln R. R. Co. *v.* Veazie, 39 Me. 572; Ang. & Ames on Corp. 66, sec. 83, p. 537, sec. 531, p. 829, sec. 779; Fire Department *v.* Kip, 10 Wend. 266; First Baptist Society *v.* Rapalee, 16 Wend. 605; Central Plank Road Co. *v.* Clemens, 16 Mo. 359; Ohio & Mississippi R. R. Co. *v.* McPherson, 35 Mo. 13; Smith *v.* Heidecker, 39 Mo. 157; Welland Canal Co. *v.* Hathaway, 8 Wend. 483, 484; Kansas City Hotel *v.* Harris, 51 Mo. 465; Camp *v.* Bryne, 41 Mo. 535; Bales *v.* Perry, 51 Mo. 449, 453; Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 57; Rockville & Washington Turnpike Road *v.* Van Ness, 2 Cranch, 449; Moore *et al.* *v.* Whitcomb, 48 Mo. 546; Powell *v.* North Missouri R. R. Co., 42 Mo. 65.

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LEWIS, J., delivered the opinion of the court.

Defendant Ganzhorn subscribed for twenty-five shares of the capital stock of plaintiff, at the par value of $100 per share, paid 10 per cent. of the amount in cash, and gave a negotiable promissory note, in the ordinary commercial form, payable on demand, and signed by himself and his co-defendant, for $2,250, the residue. The petition sets forth that plaintiff's board of directors had, from time to time, ordered certain assessments on defendants' said stock-note, amounting in all to $875, for which sum, with interest, plaintiff prayed judgment. It is also alleged that plaintiff is a corporation created under the act concerning corporations, approved March 19, 1866. Defendants' answer admitted the stock subscription and the execution of the note, but denied that plaintiff was, or had ever been, a corporation, as alleged. It denied that any assessments were ever made, as stated, and charged that the stock of the pretended corporation was a sham and a fraud from the beginning; that certain persons, mentioned by name, had falsely represented themselves as duly organized in an incorporated association, and fraudulently offered to sell stock to the public in said pretended corporation; that all the acts done by said association, in pretended compliance with the statutes concerning corporations, were "utterly void in law, and of no effect;" that the defendants had no part in the so-called organization of said company, nor any participation in the same, or profit from its business; that defendant Ganzhorn's subscription, and the execution of said note, were induced by the fraudulent representations of said associated persons, and after the said pretended organization, and without any notice or knowledge of its false and fraudulent character. Plaintiff's reply denied all the allegations in the answer, of new matter. The cause being tried before the court, sitting as a jury, the issues were found for the defendants.

Two questions are material to the determination of this

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cause: (1) Could the defendants be permitted, in defending against a note executed by them to a named corporation,to deny the payee's corporate existence? (2) If such denial was allowable, did the plaintiff fail to prove itself a corporation duly created according to law?

1. Plaintiff's counsel rightly states the general rule that a party cannot, after contracting with a corporation, as such, and securing to himself the benefits of the compact, escape its reciprocal obligations by denying the existence of the other contracting party. Nor can one who, by taking stock, or otherwise, deliberately aids in the formation and introduction of a pretended corporation, not legally authorized or created, assert such illegal or unauthorized origin against his voluntary undertaking to pay for the stock subscribed. But fraud vitiates every obligation or undertaking whose supposed basis of good faith and fair understanding of the facts is found to have been illusory. Hence it is declared that, "Where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a *bona fide* subscriber, by which he has either sustained or might sustain injury, no action can be maintained against him by the corporation for the amount of his subscription, unless such subscriber has accepted the charter, and by his *own acts* has assisted in putting it in operation." Ang. & Ames on Corp., sec. 531; *Center T. R. Co.* v. *McConaby*, 16 Serg. & R. 140. In *Central Plank R. Co.* v. *Clemens*, 16 Mo. 365, where a similar question was under consideration, Judge Gamble said: "In the present case, *as it stands admitted* upon the record that the defendant has assisted in the organization of this company, he will not be permitted to escape the duty he assumed when he subscribed for the stock, upon the ground that the company was not organized in strict conformity to the law."

In the case now before us the answer distinctly avers every fact which these authorities declare requisite for open-

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ing the way to a denial by the defendants of the plaintiff's corporate existence. It only remained to sustain the averments by their proofs.

Plaintiff exhibited in evidence its license, bearing date June 13, 1866, issued by the secretary of state under section 4, chapter 74, of the "act concerning private corporations," approved March 19, 1866, which recited that the ten corporators therein named had duly filed their articles of association, verified by the affidavit of over three of the persons signing the same; that one-half of the capital stock of said company had been in good faith subscribed, and $5,000 thereof paid in by the persons subscribing therefor. The license recited full compliance with the law in other particulars, and thereupon declared the corporators and their successors to be a body politic and corporate, by the name and style of "Occidental Insurance Company of St. Louis, Mo.," etc. Other testimony was introduced by plaintiff, tending to prove the organization and operations of the company, with the making of the several assessments set forth in the petition.

Defendants introduced in evidence an officially certified transcript of the plaintiff's articles of association, from which it appeared that the capital stock of the company was $100,000, divided into shares of $100 each; that the whole of said stock was then already subscribed by the ten corporators, who each took 100 shares, or $10,000 thereof. It appeared from this transcript that no affidavit was in fact filed with the original, as stated in the license, but that, instead thereof, an ordinary certificate of acknowledgment was appended by a notary public, in the form used for deeds and conveyances. Defendants introduced further testimony tending to prove that a considerable number of the alleged stock subscriptions were fictitious—were never intended to be enforced, and were exhibited for the sole purpose of inducing *bona fide* subscriptions by other parties. That, when the license was issued, the sum of $5,000, as

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required by the statute, had not been paid by the subscribers, real or pretended, and that not exceeding $4,500 was ever so paid at all; that defendant Ganzhorn had been deceived into his subscription of stock and execution of the note sued on, by the fraudulent misrepresentations of the parties managing the company, long after its organization, and without any knowledge or suspicion of its unsoundness in law and in fact.

At the close of the testimony the court, of its own motion, declared the law to be that, upon all the evidence in the case, the plaintiff was not entitled to recover. Plaintiff asked for several declarations of law, which were refused. The three first, in effect, asserted defendant Ganzhorn's incompetency, as a stock subscriber, to deny the plaintiff's legal existence, in order to avoid liability upon his subscription and note, or to impeach the validity or regularity of the company's organization and subsequent proceedings. The element of possible fraud committed upon the defendant being ignored in these instructions, there was no error in refusing them. The fourth instruction assumed the existence of an affidavit attached to the articles of association, and was therefore inadmissible. The fifth, upon certain hypotheses which were unobjectionable, declared that, unless the court believed, from the evidence, "that the said 25 shares of stock were unauthorized by law, and that plaintiff is not now in fact, and never was, a body corporate, and *the stock thereof* was and is a sham and a fraud, issued with intent to deceive and defraud defendant," then the plaintiff was entitled to recover, etc. This was objectionable, as requiring too much of the defendant to sustain his defense. It was sufficient for him to show, as already explained, that merely a part of the stock was fictitious, if that was effectual to mislead him. But, apart from this verbal inexactness, it is manifest that the refusal of the instruction operated no harm to the plaintiff's case. The court's finding upon the facts, as gathered from its treatment of instructions offered on either

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side, make it evident that, had the instruction been given, the result would have been the same. The sixth and seventh instructions offered by plaintiff were also objectionable in the presentation of hypotheses of fact upon which it was assumed the defendants would be estopped and the plaintiff entitled to recover, and which yet ignored all the features of misrepresentation, etc., made essential, by the testimony, to any fair statement of the case. It may be said of these instructions, also, that from the general course of the testimony, and its evident impression upon the court, there would be no ground for reversal, even if it could be shown that they ought to have been given. The finding was manifestly for the right party, upon any view of the theories they suggested.

The court, upon defendants' application, declared the law to be that, "if it appear from the evidence that $50,000 had not been in good faith subscribed to the capital stock of the Occidental Insurance Company, and $5,000 thereof actually paid in cash at or before the organization of the company, then the judgment must go for the defendants." This was the only instruction asked for by defendants, and was properly given, as already appears.

Many exceptions were saved by plaintiff upon the court's rulings in admitting or excluding testimony. In all cases, however, the action of the court was conformable with the principles applied to the instructions, and herein approved. Plaintiff's counsel has preserved and presented here every point, apparently, that could possibly be made in his client's behalf; but, upon a careful examination of them all, we are unable to discover any available error in the proceedings below. All the judges concurring, the judgment is affirmed.

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ROBERT JAESCHKE, Plaintiff in Error, *v.* AUGUSTE REINDERS, Defendant in Error.

May 16, 1876.

1. A court of equity will not interfere to set aside a conveyance of a reversionary interest, on the ground of inadequacy of consideration, where there has been no fraud or concealment, where the party selling is a man of ordinary intelligence, and where the consideration is not so inadequate as to shock the moral sense.
2. In the case of a sale by expectant heirs and reversioners, the ground of the protection extended by courts of equity is the distress of the heir or person dealing with his expectancy, and the pressure brought to bear on him. While this continues he is regarded as an infant; when it is removed, the infancy is determined; where it does not exist, the doctrine has no application.

ERROR to St. Louis Circuit Court

Affirmed.

Hitchcock, Lubke & Player, for plaintiff in error, cited: Tison *v.* La Beaume, 14 Mo. 198; Stevens *v.* Spiers, 25 Mo. 386; Kerr on Fraud, 95; Havenden on Fraud, 105; White & Tudor Ld. Cas. 151, 152; Carter *v.* Ashire, 48 Mo. 300; McCormack *v.* Malin, 5 Blackf. 509; Shelly *v.* Nash, 3 Madd. Ch. 127.

A. J. P. Garesché, for defendant in error, cited: Kerr on Fraud (1st ed.), 186; Holmes *v.* Fish, 9 Mo. 211; Chouteau *v.* Nuckolls, 20 Mo. 447, sec. 5; Parker *v.* Hannibal & St. Jo. R. R. Co., 44 Mo. 421; Cadwallader *v.* West, 48 Mo. 494; Wagner *v.* Phillips, 51 Mo. 117; Durfee *v.* Moran, 57 Mo. 379; Glasscock *v.* Minor, 11 Mo. 657; Buford *v.* Caldwell, 3 Mo. 335; Holland *v.* Anderson, 38 Mo. 59; Soulard *v.* Peck, 49 Mo. 479; Parmelee *v.* Cameron, 41 N. Y. 392.

BAKEWELL, J., delivered the opinion of the court.

This is a proceeding to set aside a conveyance on the ground of fraud.

The petition is filed on February 20, 1874, and alleges that, in May, 1869, one J. H. Koppelman died in St. Louis,

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leaving an estate there worth about $75,000, and, by his last will, devised and bequeathed all his estate to his widow, Anna, for life, and, as to the remainder, devised one-half absolutely to his adopted daughter Johanna; that the widow, as executrix, made final settlement of the estate, and afterwards intermarried with defendant; that there were no debts, and the whole estate remained in the hands of the widow; that plaintiff is the father of Johanna, the adopted daughter of Koppelman; that she died in 1872, a minor, without issue, leaving as her sole heirs plaintiff and three brothers, still minors, and all living; that, upon the death of his daughter Johanna, plaintiff became entitled to one-eighth of John H. Koppelman's estate, subject to the life estate of the widow; that said eighth is worth about $10,000; that plaintiff removed to Kansas many years before the death of Koppelman, and, up to the time of his execution of the deed which he seeks to set aside, did not know of his daughter's death, or of the death of Koppelman, nor did he know anything of the character or value of Koppelman's estate, nor as to what interest plaintiff had in it; that, about December 12, 1873, defendant having, by marriage with the widow, obtained control of Koppelman's estate, devised a plan to cheat plaintiff out of his interest therein, and, having ascertained his address, employed one Devereux to buy plaintiff's interest therein for an inadequate consideration; that Devereux sent a message requesting plaintiff to meet him at a hotel, in Lawrence, and, in pursuance of this fraudulent design, informed plaintiff of the death of his daughter, and of Koppelman's death; told him that the estate was of no great value—consisting of four lots in St. Louis—and said that Koppelman had devised one-half of this property to plaintiff's daughter, on condition that she should reach the age of twenty-five years; that Koppelman's widow was married to defendant; that plaintiff had no interest in the estate, but that defendant would give plaintiff $500 for any possible interest he might have in the estate, and urged plaintiff to accept the offer; that plaintiff

asked time to reflect and inquire as to the value of the property, but that Devereux insisted upon an immediate answer, and that plaintiff, relying upon Devereux, whom he knew, accepted the $500, and executed, acknowledged, and delivered a deed of all his interest in any property of which Koppelman died seized or possessed, which deed was recorded; that defendant knew plaintiff's ignorance of the value of this property, and that the whole transaction was fraudulently contrived by defendant to cheat plaintiff; that the consideration paid was wholly inadequate; that plaintiff first awoke to a sense of what he had done when friends in St. Louis, seeing the deed noticed in an abstract of recorded conveyances daily published in St. Louis, notified him that he had sacrificed his interests, upon learning which he at once proceeded to St. Louis and saw defendant, who acknowledged the fraud, and, at first, offered to repair it, but afterwards refused to do so; that plaintiff then tendered defendant $500, and asked him to cancel the conveyance, which was refused. Plaintiff prays for a decree declaring the deed void on payment to defendant of $500.

The answer of defendant admits that Johanna Koppelman was the natural daughter of plaintiff, and says that, on March 26, 1866, he surrendered all his parental rights over her to the deceased J. H. Koppelman, who adopted her, by deed, under the laws of Missouri, and always treated her as his child, having changed her name from Jaeschke to Koppelman; admits the death of Koppelman, and the will, and the intermarriage of defendant and Koppelman's widow, and that defendant employed Devereux to acquire any interest defendant might have or claim in the estate of Koppelman; denies that the estate of Koppelman was of the value alleged; and denies the inadequacy of the consideration paid him, and all the statements of the petition as to fraud, misrepresentation, or concealment, and as to conversation between defendant and plaintiff after the deed was executed.

On hearing, the bill was dismissed; and, a motion for a

new trial having been overruled, the cause is brought before us by writ of error.

On the trial defendant's counsel moved that the witnesses be separated by being excluded from the court room until called to testify. To this plaintiff objected, and the witnesses for plaintiff were then all sworn and sent out of court, to remain away until called. Counsel for plaintiff then inquired whether defendant proposed to testify, and, upon learning that he did, moved to exclude him from the court room whilst plaintiff's witnesses were testifying. This motion was overruled. Exceptions were duly preserved to this action of the court, but we do not see that it is to be complained of. The plaintiff himself was not present; his testimony was offered in the shape of a deposition. It is discretionary with the court trying the case whether the witnesses shall be separated during the trial, so as not to hear each other's testimony; and we see nothing which leads us to believe that discretion was improperly exercised in this case. Had plaintiff been in court he would probably not have been excluded; at any rate, he was not excluded; and we do not think that the court was bound, because it had, at the instance of defendant, separated the witnesses for plaintiff, to send the defendant himself out of court during the trial of his case. His suggestions to his counsel during the trial would probably be of great value. That the plaintiff himself was absent was a circumstance over which neither the court nor the defendant had any control; and there is no reason why it should have been allowed to deprive defendant of the right to sit beside his counsel during the trial of his cause.

The evidence in the case shows that plaintiff is a watchmaker, living in Topeka, Kansas, having three sons, whose ages range from fifteen to nine years, and who are all living away from their father. In 1866 he resided in Lawrence, and there, by deed, surrendered to John H. Koppelman all parental rights over his only daughter Johanna, who was

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then adopted, under our statute, by Koppelman, whose name she took. From that time plaintiff never inquired about his child, and never saw her again. Koppelman died in 1869, and left an estate which one witness values at $80,000, of which nearly one-half was personal property, the remainder real estate. By last will he left all he had to his wife, for life, "on the express proviso," as the will says, "that she will be a mother indeed for our adopted daughter, Johanna, six years old; that she will bring her up and educate her according to her best means." After the decease of his wife one-half of the property was to be given to Johanna, "provided she be a good girl," and the other half to go to the heirs of the testator and his wife. The widow, Anna, was executrix of the will, took possession of the property, and settled the estate. In 1872 Johanna died, aged about nine years, and, a few months afterwards, Koppelman's widow married defendant. On November 20, 1873, one year after her marriage, all the right, title, and interest of the widow was, by deed of her new husband, Reinders, and herself, conveyed to one Eugene D. Garesché, who, by deed of the same date, conveyed the same to Reinders. On November 26, 1873, Alexander J. P. Garesché, attorney for Reinders, addressed to Judge Devereux, an attorney of Lawrence, Kansas, and at that time land commissioner of the Kansas Pacific road, the following letter:

"*St. Louis, Mo., 30th November, 1873.*

"*Hon. Judge Devereux, Counselor at Law, Lawrence, Kansas:*

"DEAR SIR: I inclose to you, 1st, certified copy of the will of John H. Koppelman, as here duly probated, calling your attention to the 4th and 5th clauses; 2d, articles of adoption of Johanna Jaeschke, daughter of Robert Jaeschke, by said Koppelman, as copied from records of St. Louis county, bk. 309, p. 520. I also call your attention to the statutes of Missouri concerning the adoption of children. See Wagner's Statutes, p. 256, ch. 28. It is the counter-

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part of the act of 1857. Sess. Acts, p. 59. I call your attention particularly to the 4th clause, and these concluding words: 'This provision (and which gives to the child as against its adopted, the same rights as against its natural parents) shall not be extended to other parties, but is wholly confined to parties executing the deed of adoption. Now, Mr. Koppelman being dead, and the adopted daughter having died intestate, unmarried, and without issue, what becomes of devise to her? I say it is vested, and hence descends to her heirs. But who are these? If she came from the loins of Mrs. Koppelman, under our laws she would be sole heir. But, if it was of Jaeschke's estate, Johanna could inherit of her natural father's estate. Why, then, should not her brothers and sisters inherit from her, particularly under 4th clause of the law? Mrs. Koppelman has remarried one Auguste Reinders, my client. I have advised him to buy in the interest of the father, Mr. Jaeschke, who lives in Lawrence, if it can be bought cheaply. We wish you to see him, and ascertain if it can be had. Mr. Reinders would authorize you to offer five hundred dollars for it. Retain inclosed papers, that they may be returned to me. Jaeschke is, I believe, a watchmaker.

"Present my best wishes to your wife, and believe me to be, most truly, yours, ALEX. J. P. GARESCHÉ."

This letter appears to have been received in due course of the mail, together with the inclosures.

On receiving the letter, Judge Devereux made inquiries for Jaeschke, and found he had removed to Topeka. He then wrote to Garesché to send on a form of deed, and made an appointment with Jaeschke to meet him on December 10th, at the McMeekin House, Topeka.

The form of deed sent on by Garesché began with a preamble setting forth Koppelman's death, and that by will he had devised to his wife the usufruct of all his estate, real and personal, for life, and, upon her death, one-half to Johanna, his adopted daughter, and one-half to his right

heirs; that Johanna was the natural daughter of Jaeschke, born in wedlock, but surrendered to Koppelman by deed of adoption; the death of Johanna, intestate and without issue, a minor; that the questions arise whether the estate devised to her be vested, and if vested, whether it descends to her heirs by blood or those by adoption, and, if the former, that Jaeschke is entitled, and that Reinders married the widow. The deed, in consideration of the recitals and $500, conveys all and every right, title, claim, and demand of Jaeschke, of, in, and to the moneys, debts, dues, claims, choses in action, and demands of the estate of John H. Koppelman, deceased, and also the realty, which is particularly described, and subrogates Reinders to all rights and interests of Jaeschke in and to the estate of his daughter Johanna.

Devereux knew Jaeschke by sight, having once or twice had a watch repaired by him when he lived in Lawrence, but did not know his name or have any other dealings with him before acting for Garesché in this matter. On December 10, 1873, Devereux went to Topeka with Garesché's letter, the unexecuted deed, the copy of the will and of the deed of adoption, and met Jaeschke there by appointment. The statements of Jaeschke and Devereux as to what passed between them do not exactly accord; but, where they differ, no hesitation will be felt in giving credence to Devereux, as his statement is straightforward and consistent, whilst Jaeschke manifestly prevaricates as to some circumstances of which we will speak hereafter. The interview took place in the parlor of the McMeekin House, and lasted somewhat more than an hour. When Devereux got down from the cars, Jaeschke came up and said he was the man Devereux was looking for. Of what followed Devereux gives the following account:

"I told him I came to see him because I had received a letter from Mr. Garesché, a lawyer of St. Louis, and a personal friend of mine; that I would read it to him; and I

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did read the whole of it, except the portion which authorized the offer of $500 for his interest in the Koppelman estate, and which begins with the word 'we' and concludes with the signature. Jaeschke seemed to learn for the first time of the death of his child. I also read to him what purported to be the copy of the will of Koppelman, and may have also read the article of adoption. He invited my opinion of the matter, but I suggested he should consult his friends; that I was acting for Garesché, the lawyer of Reinders. He inquired what they would give; I at once told him $500; he hesitated a little, and said he would take it. If I could have then obtained the presence of a notary I should have concluded the business; but it was too late at night, and I had to return to Lawrence. I suggested that he should come and see me in a day or two; that I should leave on the early train. He said he would go with me, and we parted. Next morning we came to Lawrence together. About eleven o'clock A. M. of that day he came into my office, intoxicated, whilst I was transacting some business with Mr. Gilmore, my secretary, and I said to him I would transact no business with him in his then condition; if he could return sober I would conclude the matter. I saw nothing more of him till next day, when he came, and I reread the deed, also Garesché's letter; then went to the office of Bemis, a German notary, with him. Bemis was out; I then went to Mr. Sinclair's, who took the acknowledgment. Returning to my office, I called in Mr. Gilmore, and, telling him what I paid it for, gave him $500 to count and pay to Jaeschke. Jaeschke followed me into my private office and wanted to pay me for my services, which I refused. To the best of my impression, I read the copy of the will to Jaeschke, and then handed it to him to read. Garesché's letter was very difficult to decipher, and I did not hand him that, for that reason; I read it carefully to him, the whole of it, except as stated. I have no knowledge of the value of the estate, except from the letters and papers sent me as stated. I said

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nothing at all about what he ought to take; I purposely refrained from any language that would influence him in the least. I did this as due to myself and to my friend Garesché. On the contrary, I advised him to confer with his friends. I read every word of the deed to him before he executed it. I know that I said nothing whatever to him as to the age at which Johanna would enter into the estate; I said nothing whatever on that subject, further than reading him the will. I know neither Reinders nor his wife; never heard of them, except through Garesché's letter. I handed the copy of the will and deed to Jaeschke to read; he invited my opinion, but I said I would give him no advice; that I knew nothing of the laws of Missouri as to an adopted child. I reminded him, also, that Garesché was Reinders' lawyer, and that he had better consult his friends. He said he never expected anything from Koppelman's estate, or that he had no claim on it, or words to that effect. I have no recollection whatever of his saying he had no friends in Topeka to consult. I never suggested he had better take $500 or he might have no interest in the estate. He returned to Lawrence with me at his own suggestion; I told him to come in a day or two, but he said he would go with me. I am sure I read him the papers and the letter as I have stated."

Jaeschke swears: "We went up into the parlor. I told him I had three other children besides Johanna. To his question if I knew anything of Koppelman's estate I said I had heard nothing of it since 1867. He asked if I knew I inherited anything from my daughter; I replied that the gentleman to whom I had given her had, at the time, considerable wealth. I inquired what were my chances of inheritance from her; he said he could not give me much advice about that—to take anything I could get for it. He read to me three papers. One, extracts from Koppelman's will in regard to my daughter; next, what property Koppelman left, and I remember it was a number of lots. To my

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question if this was all he left, Devereux answered he did not know; that he was acting for Garesché, who represented defendant; that the best thing I could do would be to take $500 for any interest I might have. I asked time to consider, but he thought we had better fix it up right off. I wished to postpone it a few days; but he advised I should go down to Lawrence and get done with it at once. I remember Judge Devereux told me that the four lots were all the property Koppelman owned, and that the will gave my daughter the property only when she attained the age of twenty-five years; that the estate was of no great value, and I had no legal interest. I had no information except his statements. By them I was induced to sign. On January 29th I received a letter from Schmertmann that the estate was worth $80,000, of which, after a time, I would have one-half. In February, 1874, I went to St. Louis with Schmertmann, and asked defendant to take back the $500 and return the deed. He told me he could do nothing in the matter, but would, if Garesché consented. I made the same offer to Garesché. He said I was a fool to come to him with such a proposition, and had better go home. Next day I called on defendant with Schmertmann; he said, if I was wronged he would wish to right me; but if I preferred to go to law, I had better do so. Judge Devereux did not read me the will, but only the clause of it that, after twenty-five years, the property should be divided between mother and daughter, provided she was a good girl. I don't know whether I was drunk or sober on the morning of December 13th, when I was in Lawrence. I did not go to Devereux's office on the 13th, but on the 14th. He read me the deed; asked me if I was satisfied. I said I was, and signed it. I don't know whether Devereux turned me off on 13th because I was drunk. On the night of the 12th I was with him an hour or so; then did not see him till the 13th, when I did not talk with him, and between the night of the 12th and morning of the 14th I had nothing to do with him."

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The statement of Judge Devereux that Jaeschke came drunk to his office, on the 13th, was sent away on that account, and returned and concluded the matter when sober, on the 14th, was corroborated by two witnesses.

Defendant Reinders denied that he ever said to plaintiff that he would right him if he had done wrong, and said he simply referred plaintiff to defendant's lawyer.

One John H. Koppelman testified as to the value of the property, and no other testimony was introduced on that subject. He also swore that defendant told him that the deed to Eugene D. Garesché was made to induce plaintiff to sell out more cheaply; but in this he is contradicted by defendant. As the reconveyance to Reinders was, confessedly, at once made and recorded, it is difficult to see what effect this could be supposed to have.

There was no other testimony in the case of any importance whatever.

It will be admitted that, conceding Jaeschke to have had an interest of one-eighth in the real estate owned by Koppelman at the time of his death, subject to the life estate of Mrs. Reinders, and also an interest of one-eighth in so much of the personalty of the estate as might be left undisposed of at the date of Mrs. Reinders' death, $500 was an inadequate consideration for this purchase. But it is extravagant to contend, as is done by counsel for respondent, that the value of the interest sold was one-eighth of $80,000, the total value of the estate. The whole estate was worth $80,000. Of this one-half is personalty. Let us suppose that, at the death of Mrs. Reinders, the whole estate remains wholly unimpaired, and not depreciated in value. Mrs. Reinders, at the date of the sale, was forty-three years of age. She was younger than Jaeschke, and would probably outlive him. Her expectation of life was twenty-five years, by the Carlisle tables. Now, the purchasing value of an absolute certainty of $10,000 in cash, to be paid on the death of a person aged forty-three, is not $10,000, but that sum which, placed at interest for twenty-five years, will

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produce $10,000 at the end of this period. But $4,000, at simple interest at the rate of 6 per cent., will produce $10,000 in twenty-five years; and if the rate be fixed at 10 per cent., and the interest compounded annually, the sum of $1,000 will produce nearly $11,000 in the same period of time.

Many men might be very glad to get $500 for such an expectation as this, and, as the courts cannot and will not make bargains for men, in the absence of misrepresentation or abuse of confidence properly reposed, and where the parties are quite competent to contract, the courts will not interfere.

Jaeschke had, long before, resigned all parental rights over, and claims to, his daughter. He cared so little about her that he had never asked whether she was alive or dead; and, though he had a correspondent in St. Louis, did not know of her death till told of it by Devereux, years after it occurred. He knew that Koppelman was a rich man. He did not know, nor do Devereux, Garesché, or Reinders appear to have been clear, whether he really had, or not, any interest in Koppelman's estate, as heir of his daughter. They seem all to have thought that, by deed to Koppelman, Jaeschke relinquished all rights and claims as a father. He had every opportunity of taking legal advice, or of setting on foot any examination as to the facts of the case. No misrepresentations whatever were made. This cannot be said to be "such a bargain as no man in his senses and not under a delusion would make, on one hand, and no honest and fair man would accept on the other," as was the case in *Dunn* v. *Chambers*, 4 Barb. 378.

We do not think that there was here any such inadequacy of consideration as shocks the moral sense, and the conveyance cannot be set aside on that ground unless the rule contended for by counsel for respondent be correct—that no purchase of an expectant interest in an estate will be upheld unless it be shown that the consideration paid

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was entirely adequate. We do not think that such is the rule; nor do we think that the case at bar falls within that class of cases in which courts of equity have interfered, from principles of natural justice, to protect heedless and necessitous persons from the calculating rapacity of unconscionable relatives, or to guard against the improvidence which leads the young, and rash, and the dissolute to sacrifice the future for the present.

There is nothing persuasive in the circumstances of this case. Jaeschke had no sort of claim upon Koppelman, and it is not probable that Koppelman ever dreamed that Jaeschke would be enriched by his earnings, and that the consequence of the adoption of Johanna would be that one-half of Koppelman's estate would go, on the death of Koppelman, to entire strangers. Jaeschke is no young, eager, and imprudent heir, tempted to his ruin by an unscrupulous uncle, a greedy and dishonest executor, or a speculating stranger to a rich estate. He is a father who has, by a solemn instrument, conveyed away, so far as he can do so, all rights over, and interest in, his child. The cases cited to establish the universal rule which counsel would have us establish—that no purchase of an expectant interest can ever be upheld unless complete adequacy of consideration be shown—are cases of a very different character from the one at bar. "The whole doctrine of courts of equity with respect to expectant heirs and reversioners, and others in a like predicament, assumes that the one party is defenseless, and is exposed to the demands of the other under the pressure of necessity. It assumes, also, that there is a direct or implied fraud upon the present or other ancestor, who, from ignorance of the transaction, is misled into a false confidence in the disposition of his property." This is the language of Judge Story. So Lord Brougham says, in *King* v. *Hamlet*, 2 Myl. & K. 473: "The whole ground of the doctrine is the pressure on the heir or the distress of the party dealing with his expectancies. While he con-

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tinues under that pressure, as Lord Thurslow said, the law treats him as an infant. But the infancy is determined when the pressure is removed.''

Even in regard to the more modern English rule as to the power of equity to relieve expectant heirs and reversioners from disadvantageous bargains—the principle and policy of which is seriously questioned by very grave authorities, as tending to throw this class of persons into the hands of sharpers—Mr. Swanston, who carefully collates the cases, says it may be doubted whether, to constitute a title of relief, the reversioner must not also combine the character of heir.

The respondent was certainly not an heir, in the sense in which that word is used by the English chancellors. He is not shown to have been under any stress or necessity; no pressure was brought to bear upon him; he had notice that the estate in question was that of a wealthy man; he was not himself an especially ignorant man, and he was in the prime of life. We cannot see why he should not be held, under the circumstances of the case, perfectly competent to make such a contract as this.

The judgment of the Circuit Court was, therefore, one which that court might rightly give under the circumstances, and which we cannot reverse. It is accordingly, with the concurrence of all the judges, affirmed.

R. W. CATOR *et al.*, Respondents, *v.* JOHN W. COLLINS *et al.*, Appellants.

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May 16, 1876.

1. A motion to suppress or exclude a deposition for want of notice of the taking of it, made for the first time at the trial of a cause, the deposition having been on file for more than nine months, and there being a rule of court requiring that all exceptions for such cause should have been filed more than six months before, was properly overruled.

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2. A motion, made for the first time during the trial, to dismiss a suit for want of security for costs was properly overruled.

3. Where the petition charges fraud in fact in respect of a deed, and the deed is fraudulent in law, the evidence as to fraud in fact being conflicting, and the finding of the court is for the plaintiff generally, there is no reason for saying that there is a want of correspondence between the allegations and the proofs.

4. A deed is fraudulent and void as to creditors, and will be presumed to have been contrived with that intent, if, by its terms, the property is left in the hands of the grantor with power of sale.

Appeal from St. Louis Circuit Court.

Affirmed.

R. S. Voorhis, for appellants, cited: Voorhis *v.* Langsdorf, 31 Mo. 451; Stanley *v.* Bunce, 27 Mo. 270; Billings *v.* Bunce, 28 Mo. 547; Decker *v.* D'Oench, 31 Mo. 453; Bryan *v.* Penix, 18 Mo. 13; Bennett *v.* Robinson, 19 Mo. 654–658; Johnson *v.* Jeffries, 30 Mo. 423; Bevins *v.* Bolton, 31 Mo. 437; Eaton *v.* Perry, 29 Mo. 96; Howell *v.* Bell, 29 Mo. 135; Henderson *v.* Henderson, 55 Mo. 555; Carlton *v.* Patterson, 29 N. H. 580; Cushman *v.* Wooster, 45 N. H. 410; Hendricks *v.* Craig, 2 South. 567; Wilson *v.* Cornell, 1 South. 117: Lightfoot *v.* Cole, 1 Wis. 26; Pickett, Exr., *v.* Ford, 4 How. 246; Farmers and Mechanics' Bank *v.* Hathaway, 36 Vt. 539–546; Unis *v.* Charlton, 12 Gratt. 20; Garnett *v.* Yoe, 17 Ala. 74; Bryant *v.* Ingraham, 16 Ala. 116–120.

L. Eaton and *Nagel & Wislizenus*, for respondents, cited: Brooks *v.* Wimer, 20 Mo. 503; Reed *v.* Pelletier, 28 Mo. 173; Billingsley *v.* Bunce, 28 Mo. 547; Stanley *v.* Bunce, 27 Mo. 270; Lodge *v.* Samuels' Exr., 50 Mo. 204; Bump's Fr. Conv. 163, *n.* 1, 164; Voorhis *v.* Langsdorf, 31 Mo. 453; Roberts' Fr. Conv. 189; Ames *v.* Blunt, 5 Paige, 13; Farmers' Bank *v.* Douglass, 11 Smed. & M. 470; Baker *v.* Bartol, 6 Cal. 482; Sturtevant *v.* Ballard, 9 Johns. 343; Pettibone *v.* Stevens, 15 Conn. 26; Decker *v.* D'Oench, 31 Mo. 453; Alexander *v.* Warrance, 17 Mo. 228; Hepburn *v.* Dunlop, 1 Wheat. 179; Holmes *v.* Fish, 9 Mo. 201.

Gantt, P. J., delivered the opinion of the court.

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Respondents sued appellants to the February term, 1874, of the St. Louis Circuit Court. They claimed to be partners, and alleged that they had sold and delivered to Louisa Collins certain merchandise, in December, 1872; that Louisa Collins was, for a long time before said sale and delivery, a dealer in millinery and straw goods, in Missouri, possessed of a large stock of goods to her belonging in her own right, and as her own separate property; that she was the wife of John W. Collins, one of defendants, and carried on this particular business on her own account, with the consent of her husband, who was engaged in another business, neither interfering with, nor participating in, the profits of the business of the said Louisa; and that said John W. Collins was her trustee in respect of this property, and that, by deed dated December 4, 1873, she and he conveyed the property to R. S. Voorhis in trust, to secure to Worthington and Voorhis the payment of certain notes described in said deed; that said notes were wholly without consideration; the deed was fraudulent and void, as being intended to hinder, delay, and defraud creditors; and asking for a decree subjecting all of said property to the payment of the price of the merchandise by respondents sold to Louisa. John W. and Louisa Collins, Voorhis, and Worthington & Co. were made parties defendant.

Answers were filed by Voorhis, Worthington & Co., denying fraud in the making of the deed; denying that the property conveyed was the separate estate; denying that, in contracting the debt, she promised to charge her separate estate; denying that the deed was without consideration; denying all knowledge of the debt from Louisa to plaintiffs; denying all knowledge, at the time of taking the deed, of any other indebtedness on the part of Louisa, and charging an intent on the part of Louisa to defraud Worthington and Voorhis, which led to the taking possession of said stock by the trustee in said deed.

A replication was filed, denying that defendants, at the time of taking the deed, had no notice of the debt to

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the plaintiffs; denying that Louisa represented herself as free from debt when she purchased from Worthington and Voorhis, and denying the attempt of Louisa to defraud Worthington and Voorhis.

There was a trial in February, 1875, before the court, sitting as a jury, and a verdict and judgment were given for plaintiffs. A motion in arrest of judgment was filed and overruled. A motion for a rehearing was also filed and overruled. When these motions were respectively filed does not appear. Counsel should be careful to show by the record the date of such filing. It does appear that "defendants *duly* filed their motion to set aside the decree," and that "they also filed their motion in arrest of judgment." It does not appear whether either motion was filed within four days, unless this is an inference from the use of the word "duly," which may admit of doubt; but this only applies, at most, to the motion for a rehearing. It is not intended to comment further on this matter, however.

The motion for a rehearing alleged, for causes, that the finding of the court, that the deed in evidence was against the statute and void as to creditors, is erroneous, and that the decree was against evidence and against law.

The motion in arrest set forth that the pleading did not present an issue upon the face of the deed complained of; that no issue was tendered as to the legal effect of the deed; that there is no allegation that the deed is void on its face as to creditors, and the finding of the court was upon an issue not raised by the pleadings.

The Circuit Court, at general term, affirmed the judgment, and the case comes here by appeal.

At the trial the deed from John W. and Louisa Collins to R. S. Voorhis was read. It was dated November 4, 1873, and purported to be executed by John W. Collins, trustee of Louisa Collins, by her direction, party of the first part, R. S. Voorhis, of the second part, and Worthington and Voorhis, of the third part. It conveyed to the trustee "all the millinery goods, consisting of ribbons, feathers, flowers,

bonnets, etc., and all store-fixtures and gas-fixtures, at 806 North Fifth street, in St. Louis, being the same goods and fixtures this day conveyed by parties of the third part to John W. Collins, as trustee of Louisa Collins," for her sole and separate use, also, other goods, now in another store occupied by said Louisa, on Franklin avenue, and, "also, all and singular such goods and merchandise as shall be added to the stock, from time to time, as the present stock is disposed of in the course of trade;" in trust that, whereas Louisa had executed to Worthington and Voorhis her six negotiable promissory notes, of even date with said deed—one for $150, payable thirty days after date; another for $250, at sixty days; one for $150, at ninety days; one for $400, at six months; one for $200, at eight months; and one for $475, at nine months after date, all bearing 10 per cent. after date—if any of said notes should be unpaid, then the trustee might proceed to sell the property, etc., "at the most convenient place" in the city of St. Louis, to the highest bidder, "first giving twenty days' public notice" of the sale, "either by publication in some newspaper or by hand-bills, or by both."

Certain depositions were offered by plaintiffs, which had been filed in May, 1874, in term time, and no exceptions had been filed to them according to the rules of practice of the court At the trial the defendants objected that it did not appear that due notice of the taking of the depositions had been given to the defendants. The rule of court required all such objections to be filed, at latest, at the June term, 1874. The court overruled the objection, and defendants excepted.

Louisa Collins was examined by plaintiffs, and testified in such manner as to support the allegations of the petition. Mr. Voorhis contradicted her in several particulars. The debt of plaintiffs, their partnership, and other formal matters were proved.

No instructions were asked, the case being one of chancery jurisdiction, but the decree was as before stated.

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To reverse the judgment of the Circuit Court, the appellants make the following points:

1. "The question of fraud made by the pleadings is fraud in fact; and, under this allegation, fraud in law cannot be shown."

2. "The court erred in overruling the motion made, at the trial, to dismiss the suit for want of security for costs."

3. "The court erred in permitting the deposition of W. J. Watters to be read."

We will consider these points in inverse order.

1. The deposition was properly admitted. The rule of practice in the Circuit Court is very clear, and applies exactly. If the defendants had any real objection to this deposition—if, in fact, they had no notice of its being taken, and desired to challenge or dispute any fact established by it, it is inconceivable that they should not, in the nine months during which the deposition had been on file, have moved to suppress it. If such a motion had been made a little out of time, as—at the end of ten days—at the June term, 1874, with any fair excuse for the delay, we should be disposed to say that the rigor of the rule should be relaxed, and the plaintiff should be obliged to take the deposition over again, when defendants might cross-examine. But we are obliged to regard defendants as having had, and neglected, an opportunity to cross-examine; as having resolved to defer the objection to the deposition, that it did not show affirmatively the giving of notice, until the trial, when to have given it effect would have operated a surprise and an injustice; and all this in the face of a rule which admonished them that such objections must be taken seasonably or will be barred.

The appellant has cited numerous cases decided in other States, to the effect that depositions can only supply the place of the living and present witness when the statutory formalities, or, to speak more accurately, the statutory precautions by which the Legislature has guarded parties against *ex parte* testimony, have been observed. There is

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no doubt of the rule. Its application to the case before us is not perceived. The object of the law is to guard a party from being injured by the testimony of a witness whom he has had no opportunity to cross-examine, and no rule of court which respects this jealousy can be considered as breaking down the guard which the common law throws around the party. In the case before us this guard was surely not broken down. Nothing was easier than for defendants, if they really had not had notice of the taking of this deposition, to have filed their objection to it in due time. The vigilance of their counsel forbids the hypothesis that he was not aware that such a deposition was on file. By failing to make any objection until the case was on trial the defendants deprived themselves of all right to be heard, and the court acted with entire propriety, as well as in perfect conformity with precedents, in overruling the objection when made. *Brooks* v. *Boswell*, 34 Mo. 474.

2. As to the refusal of the court to entertain, at the trial, the motion to dismiss the suit for want of security for costs, we see no ground of objection. A loose practice has undoubtedly grown up in respect of the institution of suits in behalf of non-residents. Whenever a petition is offered to the clerk, and he is directed to issue the appropriate process, it is clearly competent (and, indeed, it is his plain duty) for him to inquire, if he is not already informed on the subject, whether the plaintiff be resident or non-resident, and, in the case of his being non-resident, to exact the bond for costs which is indicated by the 1st section of chapter 173, title 35, of General Statutes or Missouri. This was formerly the settled practice. Like all duties, however, the performance of it sometimes gave umbrage, and so it became customary, in ways more or less indirect, to shift this performance from one to another of the parties who may suggest the cause and ask for a bond for costs during the pendency of the suit (as provided in section 2 of the same article). Obviously the person who, as attorney, brings a suit in behalf of a non-resident, with-

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out filing an undertaking for costs, commits what may be termed an impropriety; but it is one which has been so long acquiesced in that it would be extremely harsh peremptorily to enforce against him the extreme consequences of his irregularity; and if the defendant, who, of course, is aware of the non-residence of the plaintiff, continues silent until the cause is reached for trial, and then attempts for the first time to exact these extreme consequences, he is guilty of at least as great an impropriety, and will only have himself to blame if his application be treated as the court in this case treated it. We are of opinion that the Circuit Court, in this instance, discerned what was just in the eye of the law, and administered it. We will not interfere with the discretion thus exercised. "*Discretio est discernere per legem quid sit justum.*"

3. The third point made is that the evidence given does not support the case made by the petition; that the petition alleged fraud in fact, while the evidence shows nothing of that kind; and it is also alleged with much positiveness that the finding of the court expressly negatived fraud in fact.

We have looked carefully into the record, and all support of this allegation has escaped our scrutiny. We find nothing on the subject of the finding except in the formal entry of the determination of the issues immediately preceding the entry of the judgment, and the records there used are the following: "Said parties, waiving a jury, submit this cause to the court upon the evidence and proofs adduced, and the court having heard the same, being fully advised thereof, doth find the issues joined in favor of the plaintiffs." We find nothing whatever to add to, or qualify, this finding. If it be meant that expressions fell from the learned judge by whom the cause was tried justifying the statement on this subject made by the appellants, all that we can say is, *it does not appear*.

We are, then, to look at the issues, on the subject of this deed, by the pleadings.

The petition states "that the said deed of trust was

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executed by said defendant John W. Collins, wholly without consideration, either to him or said Louisa, and with the intent, on the part of said Louisa Collins, John W. Collins, Robert S. Voorhis, J. Wilson Worthington, and Cornelius Voorhis, to hinder, delay, and defraud thereby the creditors of her the said Louisa Collins, and that the said Worthington and Voorhis are still the holders of such of said notes as remain unpaid. Plaintiffs further state that, with the view of carrying out and consummating said scheme for defrauding the creditors of said Louisa Collins, said defendant Robert S. Voorhis has, by direction of said other defendants, taken possession of said goods, wares, and merchandise," etc.

In answer to this, defendants (except John W. and Louisa Collins) say: "Defendants deny that said deed of trust was executed by said John W. Collins wholly without consideration either to him or said Louisa. They deny that said deed of trust was made with the intent, on the part of themselves, said Robert S. Voorhis, J. Wilson Worthington, and Cornelius Voorhis, to hinder, delay, and defraud creditors of said Louisa Collins. As to the intention of said John W. and Louisa Collins in executing said deed, these defendants have no knowledge other than their actions and declarations at the time of the execution, and before and after, of said deed, when they represented that they had no creditors," etc.

This is all we find making up the issues respecting the fraudulent character of the deed of trust. These issues the court found for the plaintiffs.

The evidence as to fraud, in fact, is conflicting. The court below certainly found this issue for the plaintiffs. Assuming that we are at liberty to look at the evidence in order to determine whether the court, sitting as a chancellor, determined this matter according to the evidence, we are certainly of opinion that we have no sufficient warrant for disturbing the decree upon that ground. If we were of opinion

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that the deed was made to secure a debt to Worthington and Voorhis, *and to defeat the claim of other creditors*, then, if Worthington and Voorhis were cognizant of this design, the deed would be a nullity when impeached by the creditor sought to be defrauded. *Henderson* v. *Henderson*, 55 Mo. 534–555, for the passages cited.

But, independent of this, the deed is fraudulent and void as to creditors, and will be irresistibly presumed to have been contrived with that intent if, by its terms the property is left in the hands of the grantor with power of sale. Such, we think, was what this deed contemplated and provided for. It conveyed a stock of goods, wares, and merchandise, "consisting in part of millinery and other goods now in a store occupied by said Louisa Collins, on Franklin avenue, west of Sixteenth street, in said city, and to be immediately removed into said store, No. 806 North Fifth street" (another lot had been previously described as existing at 806, and also conveyed by this deed), "and also all and singular such goods and merchandise as shall, from time to time, be placed in said store * * * to replenish and keep up the stock thereof, *as the present named stock is disposed of in course of trade.*" If this be not a provision that the business will be kept up, and the stock sold by Louisa Collins at her discretion, words have no meaning. The terms of the instruments condemned as fraudulent in the cases of *Brooks* v. *Wimer*, 20 Mo. 503, and other cases down to, and including, that of *Lodge* v. *Samuels*, 50 Mo. 204, are far less unambiguous. The judgment must be affirmed. All the judges concur.

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ALEXANDER TURNBULL, Respondent, v. FRANCIS WATKINS, Appellant.

May 16, 1876.

1. T. accepted bills of exchange in W.'s favor, for which W., by a contemporaneous written agreement, promised to advance a certain sum to T., through the latter's agent. W. advanced only part of the money promised; but T., being induced to believe that all had been advanced to his agent, caused the bills to be paid in full. *Held*, in a suit by T. for the balance not advanced by W., and for damages, that although fraud was charged against W. in collecting the whole amount of the bills, yet the action was based on the written contract, and was, therefore, not barred by the statutory limitation of five years.
2. No assignment from an agent is necessary to enable the principal to sue upon a contract made for his benefit by the agent.
3. Where the parties, in a settlement, have agreed upon the value in United States currency of a certain sum in foreign money, no further evidence is necessary to enable the jury to make a like estimate, in readjusting the settlement to the rights of the parties, and in ascertaining what amount was overpaid.
4. When the statute of limitations is pleaded against a set-off or counter-claim, the time must be computed from the commencement of the suit, and not from the filing of the answer.
5. A jury cannot properly allow interest from a date prior to that from which the party claims it in his pleading.

APPEAL from St. Louis Circuit Court.

Reversed and judgment.

Hitchcock, Lubke & Player, for appellant, cited: Wag. Stat. 918, sec. 10, p. 1013, sec. 3; Bush v. Baldry, 11 Allen, 369; Hixon v. Hixon, 7 Humph. 33; Ord v. Ruspine, 2 Esp. 569; Walker v. Clemens, 9 Eng. Law & Eq. 332; Gordon v. Bruner, 49 Mo. 570; Ackley v. Staehlin, 54 Mo. 558; Wag. Stat. 1015, 1016, 1273, secs. 12, 13, 1.

Cline, Jamison & Day, for respondent, cited: Whittlesey's Pr. 26, 27.

LEWIS, J., delivered the opinion of the court.

The petition sets forth, in effect, that Tal. P. Shaffner drew on plaintiff three bills of exchange, all dated at London, England, on February 22, 1864; one at four months, for

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£600, one at eight months, for £625, and one at twelve months, for £650; that all were duly accepted by plaintiff, and were indorsed and delivered by Shaffner to the defendant; that the entire transaction was for plaintiff's benefit, as a means of raising money to be advanced by defendant, and was negotiated and perfected through Shaffner as plaintiff's agent; that defendant at the time executed and delivered to Shaffner a receipt and agreement, in writing, which, after describing the bills of exchange, etc., proceeded thus:

"The understanding being that I am to use the second to repay the first, and the third to repay the second, making the whole indebtedness in the transaction by the bills the sum of £650, the last note or bill, which is secured by mortgage on certain real property in the city of St. Louis, State of Missouri; and on this latter bill I this day advance the sum of two hundred pounds sterling (£200), and the remainder of the proceeds of the first bill, as per bank discount, is to be paid the said Shaffner on the return of information from St. Louis that the said mortgage is correct and *bona fide*, as therein stated. F. Watkins."

The petition further states that, although the defendant "received and accepted such mortgage as being correct and *bona fide*, yet, aside from another sum of £100 paid to said Shaffner on June 21, 1864, making £300 in all, the defendant has never paid anything more, either to this plaintiff or said Shaffner, on account of said bills of exchange;" that, after the maturity of the said last bill, the plaintiff, being in entire ignorance of the fact that only part of the required advance had been paid to Shaffner by defendant, and being importuned for payment of the bill by defendant, who well knew of plaintiff's said ignorance, and who falsely and fraudulently represented that the whole amount of the bill was due to him, directed C. C. Whittelsey, his agent in St. Louis, to sell certain real estate of plaintiff's and pay off said bill; that Whittelsey thereupon sold said real estate at a great sacrifice, and, on October 3, 1865, paid to the

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defendant, from the proceeds, the sum of $4,710.05, which appeared to be then due on the bill, including interest and the existing premium on gold; that said sum was in fact $2,173.86 more, for the reasons already stated, than the defendant was entitled to receive; that defendant, through all the transactions, knew that Shaffner was plaintiff's agent merely, and had no ownership or other interest in said bills of exchange or their proceeds; that the knowledge of defendant's deceitful practices, etc., first came to the knowledge of plaintiff within five years prior to the institution of this suit. Judgment is prayed for the said sum of $2,173.86, with interest from October 3, 1865.

The answer, after general denials, alleges that defendant purchased the bills from Shaffner, who represented himself as their holder, for value, and advanced to him thereon various sums, amounting to £420; that the mortgage mentioned in the receipt was found to be worthless, and that defendant was compelled to expend divers large sums of money in and about the procuring of a proper conveyance, relieving the property of prior incumbrances, and other charges which should have been borne by plaintiff, amounting to the sum of $2,543.05. An itemized account of these expenditures is filed with the answer, and is presented as a counter-claim, upon which defendant prays judgment against the plaintiff for the said sum of $2,543.05. The statutory limitation of five years is also specially pleaded against the plaintiff's claim.

Plaintiff's reply denies the new matter set up in the answer, and pleads the statutory limitation of five years against the counter-claim. The suit was commenced on March 14, 1873. Defendant's answer was filed February, 9, 1874.

The testimony on either side tended generally to sustain the allegations of the parties respectively, involving, of course, many conflicting statements. Mr. Whittelsey testified that, as plaintiff's agent, he sold the real estate in St. Louis, and defendant was the purchaser at a reduced price;

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that the bill of exchange for £650 was taken for its face value in part payment of the purchase money, by plaintiff's direction; that Whittelsey and defendant together computed the value of the bill in United States currency, gold being then at 144 premium, and agreed in fixing it at $4,710.05, for which sum, accordingly, a credit was allowed in defendant's favor, and the bill was handed over to Whittelsey. The verdict was in plaintiff's favor for $1,252.64, and against the defendant's counter-claim.

On plaintiff's application, the court instructed as follows:

"If the jury believe from the evidence in this case that, in the making of the contract sued on by the plaintiff, the said Shaffner was acting as the agent of the plaintiff, and that defendant has failed to pay the amount agreed to be paid by said agreement, and that the said Watkins has received and acted upon the bill of exchange referred to as being valid and *bona fide*, then you are instructed that the plaintiff is entitled to recover the difference between the amount which he has actually paid thereon, with interest on such difference, from the date of said agreement to the present time, at the rate of six per cent. per annum.

"The jury are instructed that, if you believe from the evidence in the case that the right of action in behalf of the defendant against the plaintiff, for the claims and demands set up and alleged in defendant's counter-claim, accrued to the defendant more than five years prior to February 9, 1874, then the defendant is not entitled to recover on said counter-claim, and you must so find."

Defendant asked for the following instruction, which the court refused:

"If, from the evidence in this case, the jury believe that plaintiff, more than five years before the commencement of this suit, March 14, 1873, knew what advances defendant Watkins had made to and for plaintiff upon the bill of exchange for £625, mentioned in the petition in this case, then plaintiff cannot recover."

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These instructions, given and refused, present the grounds upon which defendant claims a reversal of the judgment.

It is argued that the petition presented a case, not for breach of contract, but for an alleged fraud; that therefore the limitation of five years attached to the demand, so that the plaintiff's instructions were improper, and the defendant's ought to have been given. It is true that the petition alleges fraud, and attempts, apparently, to evade the five-years limitation by declaring that plaintiff first discovered the fraud within five years prior to the commencement of the suit. But the basis of the action is manifestly the written contract framed with the receipt given to Shaffner. But for that, there would be no right of recovery at all. Plaintiff's taking up of the bill, through Whittelsey, would have been treated as a voluntary payment, excluding any claim for redress. But, with the written contract, this feature becomes an item of damages for the breach thereof. It performs no other office here, though attended with an alleged deceit practiced by the defendant. The court, therefore, did not err in refusing to apply to the claim sued on the statutory limitation of five years.

Defendant's counsel seem to assume that an assignment from Shaffner was necessary before plaintiff could sue upon the contract. This was not necessary to the plaintiff's case. If Shaffner acted as plaintiff's agent, in making the contract, his principal was entitled to enforce it for his own benefit. The instruction given properly recognized the necessity that such agency appear in the proofs.

Defendant further objects that there was no evidence to show the value, in United States currency, of the pounds sterling mentioned in the contract. An act of Congress, passed in 1857, would appear to have abolished the standards of value for foreign coinage in private contracts. But the testimony of Mr. Whittelsey was sufficient to supply any want in that relation here. As agent for plaintiff he agreed with the defendant upon an estimate of the amount in currency, including the premium on gold, which would

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satisfy the bill of exchange for £650. This was legitimate evidence, at least, tending to establish the amount which was overpaid by plaintiff, or the elements from which this might easily be computed by the jury.

The rule is well settled, both in England and in America, that a set-off or counter-claim, if not barred by limitation at the commencement of the suit, will be good, although it would otherwise be barred when first pleaded. *Crook* v. *McGreal*, 3 Tex. 487; *Stilwell* v. *Bertrand*, 22 Ark. 375; *Walker* v. *Clements*, 9 Eng. Law & Eq. 332. The second instruction given for plaintiff was therefore wrong in requiring the defendant to show that his counter-claim accrued within five years prior to the filing of his answer, instead of five years prior to the institution of the suit. But the defendant's account against plaintiff contained only three items which bore date within five years before the commencement of the suit. The instruction, therefore, by his own showing, deprived him of no right except as to these three items, whose aggregate amount was $319.44. All other items of the counter-claim were, according to the defendant's answer and his own testimony, barred by limitation when the plaintiff's petition was filed.

Another mistake was committed in directing the jury to allow interest in plaintiff's favor from the date of the agreement, or February 22, 1864. The petition claimed interest only from October 3, 1865. The court could not properly authorize a verdict for more than the plaintiff demanded.

These errors of amount should hardly subject the parties to the expense and harassments of another trial. The principal sum which would yield, at 6 per cent. interest from the date of the agreement, the sum of $1,252.64, as found by the jury, at the date of their verdict—April 15, 1874—is $778.53. Interest on this principal sum for one year, seven months, and eleven days, the time erroneously included, amounts to $75.37. This, added to $319.44 of defendant's counter-claim not barred by limitation, will make $394.81, which sum fairly represents the total of

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errors in computation against defendant, under the instructions given.

The judgment will be reversed, and judgment will be rendered here in favor of the respondent for the sum which will remain after deducting from the amount of his judgment below the above-mentioned sum of $394.81, with interest at 6 per cent. on such remainder, from the date of the verdict. Leave is given the respondent to move, within ten days after the delivery of this opinion, for a setting aside of the final judgment here rendered, and a remanding of the cause for another trial. All the judges concur.

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MICHAEL KINEALY, Appellant, *v.* PATRICK MACKLIN *et al.*, Respondents.

May 16, 1876.

The interest of an execution debtor, in real estate which he has attempted fraudulently to convey, is salable under execution, and, where the deed is found fraudulent and void, the plaintiff in a proceeding to set the same aside and vest title in him, as purchaser at execution sale, is entitled, on proof of these facts, to an absolute decree vesting defendant's title to the premises in him.

APPEAL from St. Louis Circuit Court.

Order of general term, remanding cause to special term, reversed, and the order reversing the action of special term affirmed, and final judgment rendered.

Dryden & Dryden and *M. Kenealy*, for appellant, cited: Hurck *v.* Erskine, 50 Mo. 119, 2d par.; State *v.* Newkirk, 49 Mo. 472; Gale *v.* Grimes, 9 Ind. 143; Carney *v.* Emmons *et al.*, 9 Wis. 118; Beebe *v.* Bank of New York, 1 Johns. 529; Ryland *v.* Callison, 54 Mo. 514; Herrington *v.* Herrington, 27 Mo. 560; Pepper *v.* Carter, 11 Mo. 540; Eddy *v.* Baldwin, 23 Mo. 588; Allen *v.* Berry, 50 Mo. 90;

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Ames *v.* Gilmore, 59 Mo. 538 (syllabus), 550; Howe *v.* Colby, 19 Wis. 583.

Davis, Thoroughman & Warren, for respondents, cited: Hurck *v.* Erskine, 50 Mo. 119; McKey *v.* Underwood, 47 Mo. 187.

BAKEWELL, J., delivered the opinion of the court.

This action is brought by appellant, as purchaser at an execution sale, to set aside a conveyance of the property purchased, made by defendant Patrick Macklin, the execution debtor, to Francis L. Haydell, as trustee for the sole and separate use of defendant Ann Macklin, the wife of defendant Patrick Macklin.

The petitioner alleges that William B. Ferguson obtained judgment against defendant Patrick Macklin on a promissory note of which he was maker; execution was levied on certain real estate owned by Patrick Macklin, part of which was purchased, at the sale under the execution, by plaintiff; that, after suit and before judgment, defendant Patrick conveyed all his property, including that afterwards purchased by plaintiff at sheriff's sale, to defendant Haydell, in trust for defendant Ann Macklin, his wife, and with intent to hinder, delay, and defraud Ferguson and other creditors of defendant Patrick. The petitioner sets out the sheriff's deed, and prays to have the deed of Macklin to Haydell, trustee, declared void, and also prays for possession of the property and for an account.

The answer denies the allegations of the petition, and says that the property in suit was purchased with money the separate estate of defendant Ann, and that Ferguson knew this when the note sued on was given.

The new matter in the answer is denied in the replication.

On the trial, plaintiff introduced evidence tending to prove all the allegations of the bill.

The defendants introduced evidence that Patrick and Ann Macklin were married in 1856; that Ann had then some money, the fruits of her earnings and savings; that she

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continued to earn money after her marriage, and received some from her father in Canada; that after her marriage, and in the first year, she bought a lot of ground, in her own name, with her own money, and built a house on it with her money; that in 1859 she sold this property, and bought with part of her proceeds the land in controversy and other adjacent property, but that the deeds were, without her knowledge, made to her husband; that she first discovered this fact in 1862; that in 1859 she was keeping a grocery on Christy avenue, and made money in the business, and proceeded to erect improvements on this property with her own money and earnings; that her husband, except when in the army, lived with her, but was sickly, and earned nothing; that when Macklin signed the note sued on by Ferguson he told Ferguson that he was not responsible, pecuniarily, and that all the property in his name belonged to his wife.

The testimony of Patrick and Ann Macklin was, in many important particulars, contradicted by their own depositions previously taken in the cause. Receipts were introduced for rent of portions of the property, given by Patrick Macklin, in his own name; there was evidence that he kept the store for many years himself, his wife helping him; that he leased it, and sold the stock to one Meise; that Mrs. Macklin never made claim to the store or the rents; that Macklin, on two different occasions, swore that he himself owned the property—once in a suit in the Circuit Court, in which he was plaintiff, wherein he swore, in the presence and hearing of his wife, that he owned the property in question, and the grocery and the stock in it; that his wife heard this testimony, and was very desirous to corroborate it, but was objected to as incompetent; and that again, in a suit before Justice Powers, he swore to the same facts.

The record is extremely voluminous. The testimony of Macklin and wife, to the case set up in their answer, was contradicted, and the evidence is conflicting. The cause being

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submitted, the court found all the issues for the plaintiff; and, having looked through this mass of testimony, we see no reason to disturb this finding.

The court made the following interlocutory decree: "Now, at this day, come the parties, by their respective attorneys, and, no jury being required, the cause is submitted to the court upon the pleadings and proof adduced; and the court, having heard and considered the same, and being fully advised in the premises, finds the issues herein for the plaintiff. It is therefore ordered that an interlocutory decree be entered herein for plaintiff; and the court decrees that the deed of Patrick Macklin and Ann Macklin, his wife, to Francis L. Haydell, in trust for the use and benefit of said Ann Macklin, dated May 13, 1873, recorded in the recorder's office of the county of St. Louis, in the State of Missouri, on pages 121, 122, of book 475, described in plaintiff's amended petition, be set aside, annulled, and for naught held as against plaintiff, and that plaintiff ought to be put in possession of the said premises and property described in his petition, unless defendants, on or before the 10th day of May next, shall pay into court, for the use and benefit of plaintiff, the amount of the judgment recovered by the said William R. Ferguson against said Patrick Macklin, described and recited in said amended petition, with all costs therein, and also the costs and expenses of all proceedings in this court, or of the sheriff aforesaid, on execution issued on said judgment, including said sale by said sheriff to plaintiff, and all the costs of this suit; and the court doth order, adjudge, and decree that, if defendants pay into this court, on or before the 10th day of May next, the said amount of said judgment, together with the costs and expenses aforesaid, then plaintiff's petition aforesaid shall be dismissed, and defendants shall go hence without day; but if defendants shall fail, neglect, or refuse to pay the said amount, together with said costs and expenses, into the court, for the use of plaintiff, on or before the 10th day

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of May next, then a final decree shall be entered and made herein for the plaintiff, and the said deed of Patrick Macklin and Ann Macklin, his wife, to said Francis L. Haydell, trustee, for the use and benefit of said Ann Macklin, shall be deemed and adjudged to be set aside, annulled, and for naught held, and plaintiff shall be declared, adjudged, and decreed to be owner of the premises and property hereinbefore mentioned, as described in said petition, and that plaintiff be thereupon forthwith put in possession of said premises and property, and have execution for his costs."

Defendants paid into court the money called for by this interlocutory decree, which money plaintiff refused to accept, whereupon the court entered a final decree dismissing the plaintiff's bill. Motions for a rehearing and new trial were filed both by plaintiff and defendant, which were overruled, and exceptions were duly saved; and both parties appealed to general term, where the decree of the Circuit Court at special term was reversed, and the cause remanded for further proceedings. Plaintiff then filed a motion for a rehearing, which being overruled, and all exceptions being saved, plaintiff prayed an appeal, and tendered a bond, which being approved, the appeal was allowed.

1. There can be no question that the court, having found the issue for plaintiff, should have decreed the deed from Macklin to Haydell null and void. It is settled law, in this State, that the interest of an execution debtor who has made a fraudulent conveyance of land is salable under execution. The court had no legal right, having found the issues in favor of plaintiff, to compel the plaintiff, by its decree, to a compromise of his legal right. If the deed to Haydell was in fraud of creditors, and void, and plaintiff purchased at execution sale, it follows that the title which Macklin had at the time of that conveyance has been acquired by plaintiff, and a decree should have been entered vesting in

plaintiff the title acquired by Haydell by virtue of the deed attacked, and for possession of the land, and costs.

2. We further think that the Circuit Court at general term should have rendered a final decree on the merits. There seems to be no good reason why defendant, having had every opportunity for preparation, and having, apparently, availed himself of every means of defense in his power—there having been no error in any proceeding herein, up to the conclusion of the trial—should not be now forever precluded. The proofs were all before the Circuit Court at general term; they are before us now, and there should now be an end of litigation in this matter. The cause is manifestly ripe for final decision, and no reason appears why it should be remanded. We shall, therefore, enter here the decree which should have been entered in the Circuit Court when the issues were found for plaintiff.

The order of the general term of the Circuit Court, remanding the cause to special term, is reversed; the judgment of the Circuit Court, reversing the decree of the Circuit Court at special term, is affirmed, and a decree is entered here, vesting in plaintiff the title acquired by Haydell in the property described in plaintiff's petition, as purchased by him at sheriff's sale, and for possession of the premises described in the sheriff's deed to plaintiff. The other judges concur.

On motion for a rehearing, BAKEWELL, J., delivered the opinion of the court.

This is a motion for a rehearing. We have carefully considered the arguments of counsel, filed in support of the motion.

It is urged that, though general term might have entered the decree which should have been entered by special term, in this cause, and did not do so, we, on appeal from the order of general term remanding the cause for a new trial, have no power to enter such a decree as was the neces-

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sary legal and logical consequence of the finding of the Circuit Court at special term, which found the issues for plaintiff, and committed error in the decree which it entered upon the finding. We consider that it was our clear duty not to reverse and remand the cause, no error having been committed up to the entry of the decree, and that, all the facts being before us, we had the power to enter here such a decree as manifestly ought to have been entered by the court which tried the cause. The decree of the Circuit Court at special term was one by which plaintiff was aggrieved, and he appealed from it, as he lawfully might. He was also aggrieved by the order of general term, and from that order an appeal lay on certain conditions, with which plaintiff fully complied. To say that he was not aggrieved by the order of general term, because that order involved the reversal of a decree of special term by which he was also aggrieved, is a mere play upon words, and to say that we cannot, in this case, enter a final decree here, because general term did not see fit to do so, is to take a view of the powers and duties of this court in which we cannot acquiesce.

The argument on the merits of the case presents no suggestion which has not been fully considered. We see no reason for granting a rehearing in this cause, and the application is therefore denied. All the judges concur.

JOHN D. STONE, Respondent, v. J. K. WENDOVER, Administrator of WILLIAM F. STACEY, Appellant.

May 16, 1876.

1. In an action on covenant it is sufficient if the words used in the petition, either in their expressed intent or by necessary implication, show that a breach has been committed.
2. The rule of evidence that a condition of things once shown to exist will be presumed to continue until the contrary appear may be equally applicable

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to a pleading, where the fact stated is in its nature continuous, and no limitation of time is suggested. In any event, no objection of the contrary can be entertained after a verdict which could not have been rendered unless the fact of continuance had been sufficiently shown.

3. In a petition charging different violations of the same contract, in separate counts, it is unnecessary to repeat, in every count, the terms of the contract which are common to all, by way of inducement.

4. A suit by a partner against his copartner, upon a claim not founded on the plaintiff's interest in the partnership assets, but arising from a direct violation of the articles of copartnership, need not be delayed for the taking of an account of the partnership affairs.

5. A partner satisfying a judgment against himself upon an indorsement made by his copartner in violation of the articles, is entitled to reimbursement for the costs paid in such satisfaction, as well as for the amount of the judgment otherwise.

6. When there are two or more counts or demands in a petition, and the verdict is for a gross sum, the objection thereto must be made in the trial court; otherwise, it will not be noticed on appeal or writ of error.

Appeal from St. Louis Circuit Court.

Affirmed.

Dryden & Dryden, for appellant, cited: 1 Greenl. on Ev. (7th ed.) 52, sec. 41; Wag. Stat. 1012, sec. 1; 1 Chitty's Pl. 413; Childs *v.* The Bank, 17 Mo. 213; Mooney *v.* Kennett, 19 Mo. 551; Clark *v.* Hannibal & St. Jo. R. R. Co., 36 Mo. 202; Brownell *v.* Pacific R. R. Co., 47 Mo. 239; City of St. Louis to use *v.* Allen, 53 Mo. 44.

Wm. Patrick, *C. G. Drummond*, and *Krum & Madill*, for respondent, cited: Ahern *v.* Collins, 30 Mo. 145; Schwart *v.* Naylor, 2 Duer, 678; Richardson *v.* Farmer, 36 Mo. 35; Jones *v.* Louderman, 39 Mo. 287; Kercheval *v.* King, 44 Mo. 401; Hay *v.* Short, 49 Mo. 139; Hapgood *v.* McKoon, 49 Mo. 77; Poe *v.* Dornec, 48 Mo. 441; 8 Ohio St. 293; Rowland *v.* Phalon, 1 Bosw. 43; Fugate *v.* Glasscock, 7 Mo. 577; Coll. on Part., sec. 245; Johnson *v.* Armdall, 34 Mo. 339; Dillard *v.* Noe, 3 Ark. 449; Deery *v.* Cray, 5 Wall. 796; City of Alleghany *v.* Nelson, 25 Penn. 332; Byrd *v.* Blusing, 11 Ohio St. 362; Phillips *v.* Jordan, 3 Stew. 38; Nelson *v.* Brownlee, 24 Ark. 587; Anderson *v.* Cople, 26 Ind. 329; Fankbonner *v.* Fank-

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bonner, 20 Ind. 62; Thorn *v.* Watson, 10 Ill. 26; Smith *v.* Erer, 21 Ala. 38; Hathaway *v.* Jones, 21 Ark. 109; Sheperd *v.* Bank of Missouri, 15 Mo. 141; Payne *v.* Collier, 6 Mo. 321; Ramsey *v.* Gross, 9 Gill, 56; Buckner *v.* Bush, 1 Duv. 394; Currens *v.* Radcliff, 9 Iowa, 309; Granger *v.* Buck, 3 Iowa, 570.

LEWIS, J., delivered the opinion of the court.

The petition states that, in January, 1859, plaintiff and defendant's intestate, William F. Stacey, formed a copartnership, as carpenters and builders, under the firm style of Stacey & Stone; that, in the articles of copartnership, which are filed with the petition, it is stipulated that "neither party thereto should, without the consent of the other, during the continuance of the partnership, use or indorse the copartnership name of Stacey & Stone on any note or bill for the accommodation of any third party or parties;" that, in September, 1869, said Stacey, without the knowledge or consent of plaintiff, indorsed the firm name on a note, for the accommodation of Ladd & Miller, in the sum of $1,400; that the Western Savings Bank, being the holder of said note, and having had the same duly protested for non-payment at maturity, recovered judgment thereupon against plaintiff, in October, 1871, so that, on October 20, 1871, plaintiff was compelled by execution to pay the sum of $1,785.05, including interest and costs of suit, to satisfy said judgment. Plaintiff therefore prays judgment for the sum so paid, with interest and costs. For another cause of action the petition states that said Stacey, in February, 1870, without the knowledge or consent of plaintiff, indorsed the firm name of Stacey & Stone on a note, for the accommodation of Ladd & Miller, in the sum of $450; that protest and judgment against plaintiff followed, as in the former case, whereupon plaintiff was in like manner compelled to pay the sum of $542.50, including interest and costs of suit. Judgment is prayed for the sum so paid, with interest and costs. The answer

is a general denial. Upon trial before the court, sitting as a jury, there was a general finding of damages for plaintiff in the sum of $2,429.84, and judgment accordingly. Defendant filed unavailing motions for new trial and in arrest of judgment. All the points which will be herein considered, with a single exception, were properly saved by defendant in the various stages of the proceeding.

Defendant contends that the petition leaves it uncertain whether the action is based on a breach of the copartnership agreement or on an assumed violation of the general obligations of a partner, claiming that there is no explicit declaration of a breach of covenant. The weight of this objection is not apparent. It is settled that where the words in a petition, either in their expressed intent or by necessary implication, show that a breach has been committed, it is sufficient for an action upon covenant. *Schenck* v. *Naylor*, 2 Duer, 678.

Defendant further complains of the petition because it does not state that Stacey's acts of indorsement occurred during the continuance of the partnership. The partnership is stated to have commenced in 1859, about ten years prior to those indorsements. The rule that a condition of things once shown to exist will be presumed to continue until the contrary appear is stated as a rule of evidence. But there seems no good reason for not applying it equally to a pleading, where the fact stated is in its nature continuous, and no limitation of time is suggested. At all events, such an objection to the petition cannot be entertained here, since there could have been no finding for the plaintff without proof of the fact omitted. *Jones* v. *Louderman*, 39 Mo. 287; *Hay* v. *Short*, 49 Mo. 139.

Another objection made against the petition is that in the second count there is no statement of the fact of partnership, or of any covenant or agreement between Stacey and Stone, as to which a breach could be predicated. The articles of copartnership, as stated in the first part

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of the petition, are common to both counts. It would, I think, be a novel practice in this State, in a suit on a penal bond, for example, to restate the terms of the bond with every breach alleged. Said Duer, J., in *Rowland* v. *Phalen*, 1 Bosw. 60: "To require the pleader to repeat the averments setting forth the making of the agreements, and its performance on the part of the plaintiff, before each statement of a breach, would not only be requiring what was wholly unnecessary before the code, but would be requiring a useless repetition, which the code in terms forbids." The petition is without fault in this particular.

Defendant further claims that the plaintiff has wholly mistaken his remedy; that an account must always be taken of the partnership affairs before any judgment can be rendered in favor of one partner on account of rights growing out of the joint interests. The principle is right, but the application is wrong. The plaintiff's claim in this case does not arise from any interest which he held in the partnership affairs. It proceeds from a transaction which, by the very terms of the copartnership, could never be associated with that relation. It is a simple breach of covenant between two persons, the remedy upon which needs not to be delayed for the adjustment of mutual rights and liabilities belonging to another category. The direct application of the remedy in such cases is fully sanctioned by precedent and authority. *Want* v. *Reece*, 1 Bing. 18; *Dunham* v. *Gillis*, 8 Mass. 462.

There was no error in computing, as part of plaintiff's damages, the costs recovered against him in the suits on the indorsed notes. This action is not for contribution on account of a joint liability growing out of the partnership. The plaintiff was entitled to reimbursement for all his losses and expenditures directly necessitated by the violation of contract on the part of defendant's intestate, especially

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since this involved, also, an abuse of the powers ostensibly derived from a relation of peculiar trust and confidence.

It is further objected that the verdict was for a general sum on the two counts in the petition, when there should have been a separate finding upon each of the breaches alleged. The objection comes too late. It was not presented, either in the motion for new trial or in the motion for arrest of judgment. In *Fickle* v. *St. Louis, Kansas City & Northern Railway Company*, 54 Mo. 219, one of the grounds of the motion for new trial was that "the finding, or verdict, is not specific or proper." This came more nearly to suggesting an objection of the same character than anything contained in the motions here appearing. Yet the Supreme Court refused to consider the point, because it was not more distinctly presented in the court below. All the judges concurring, the judgment is affirmed.

JOHN EBLING, Appellant, *v.* JOSEPH FUYLEIN, Respondent.

May 16, 1876.

Though one found in possession of real estate by the owner, who has given a written lease to a third party, is *prima facie* liable as assignee of the lease, yet it is always open to him to prove the character of his tenancy, and that he is not in fact assignee of the lease.

APPEAL from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant, cited: Rain *v.* Hixie, 2 Hilt. 311; Williams *v.* Woodard, 2 Wend. 487; Provost *v.* Calden, 2 Wend. 617; Carter *v.* Hammett, 12 Barb. 253; Grant *v.* White, 42 Mo. 290, 291; Rector *v.* Rankin, 1 Mo. 371; Armstrong *v.* Wheeler, 9 Cow. 88; Taylor *v.* Zepp, 14 Mo. 482; Major *v.* Rice, 57 Mo. 384; Willison *v.* Walkins, 3 Pet. 43; Brown *v.* Brown, 30 N.Y. 540; Allen

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v. Sales, 56 Mo. 28; Wag. Stat. 88, secs. 33, 34, 35; Gunn *v.* Sinclair, 52 Mo. 327.

Bell & Thompson, for respondent, cited: 1 Washb. on Real Prop. 444, sec. 4; 1 Wag. Stat. 655, sec. 2; Quackenboss *v.* Clark, 12 Wend. 555; Bagley *v.* Freeman, 1 Hilt. 176.

BAKEWELL, J., delivered the opinion of the court.

It appears from the pleadings and evidence in this case that plaintiff, on September 15, 1869, by lease in writing, demised to one Michael Müller a certain store and dwelling-house in St. Louis, at the rent of $600 per year, payable monthly in installments of $50 per month, for the term of four years. Shortly afterwards the lessee died, leaving a widow and several minor children. The widow continued the business on the demised premises until September 9, 1872, when she sold out to defendant, and at the same date made a writing on the back of the lease, by which she assigned to defendant all her right, title, and interest in the premises, and in the unexpired term of the lease, and also attempted to assign the interest of her deceased husband in the lease. At the same time, she went with defendant to plaintiff, told plaintiff what she had done, and said that defendant would thereafter pay the rent. Defendant then asked plaintiff if he would assign the lease; to which plaintiff replied that he would, if they wanted him to do so, but that his word was as good as his bond if the rent was paid, and Mrs. Müller then said that plaintiff had nothing to do with the lease. Neither plaintiff nor defendant signed anything. On September 15, 1872, defendant moved into the premises, and remained there till February 15th, on which day he paid all rent due to that date, delivered the key to plaintiff, and vacated the premises. It is stated in the answer, and not denied, that defendant gave one month's notice, in writing, to plaintiff that he would vacate the premises on February 15th.

Plaintiff sues on the lease, and seeks to hold defendant

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for the rent due for the unexpired term, as assignee of the lease.

This cannot be done, under the evidence. Though it should be held that defendant, being found in possession by the owner who had given a written lease to a third person, was bound to explain his possession, and, in the absence of any such explanation, incurred a *prima facie* liability as assignee of the lease, yet it is always open to a tenant to prove the character of his tenancy, and that he is not in fact in as assignee of a lease.

This defendant has done by the testimony of the witnesses of the plaintiff. There is no question about the facts; and, clearly, Mrs. Müller could not assign the lease, for she was not the lessee, nor was she the legal representative of the lessee.

The court rightly held that defendant was not the assignee of the leasehold, and that his liability ceased with his occupation of the premises. The instructions asked by plaintiff, on the theory of an assignment of the lease, were properly refused. Judgment was rightly entered below for defendant; and, with the concurrence of all the judges, it is affirmed.

LOUIS WAGNER, Respondent, *v.* JOHN F. W. DETTE *et al.*, Appellants.

May 16, 1876.

1. A covenant in a building contract, that the builder is to keep the building free from mechanics' liens, and so deliver it to the owner when completed, is not broken by the creation of such a lien, if it be directly due to the default of the owner, and if, when he is compelled to discharge it, he is indebted to the builder, on account of the contract, in a sum greater than that necessary to pay off the lien.
2. In an action by the owner against the builder, for breach of covenant to keep the building free from liens, the defendant is entitled to prove, in

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reduction of damages, the amouut due to him on the contract, from the plaintiff, at the time when the latter paid off the liens complained of, and at the commencement of the suit.

3. The plaintiff in a suit on a penal bond cannot recover more in damages than the loss actually suffered. No loss or damage accrues to him from compelled payments, when such payments operate to discharge, *pro tanto*, other liabilities assumed by him in the same contract.

4. It is not essential to the defense of either set-off or recoupment that the defendant ask for an affirmative judgment against the plaintiff.

APPEAL from St Louis Circuit Court.

Reversed and remanded.

Eber Peacock, for appellants, cited: Gordon v. Bruner, 49 Mo. 570; Wag. Stat. 911, sec. 20; Deaffin v. Bonville, 8 Mo. 395; Gautner v. Kemper *et al.*, 58 Mo. 570; Benny v. Rhodes, 18 Mo. 147; 9 Wheat. 737; 1 Story's Eq. 459.

Dryden & Dryden, for respondent, cited: Wag. Stat. 911, sec. 20.

LEWIS, J., delivered the opinion of the court.

This is an action on a penal bond in the sum of $5,070, conditioned for fulfillment of the terms of a building contract. The contract is set out in the petition, showing that defendant Dette agreed to build a house for plaintiff, according to plans and specifications referred to, with stipulations, among others, that the house was "to be completed and delivered to the plaintiff on or before the 15th day of May, 1871, and that the said building should be free, and should be kept free, from all liens, claims, or incumbrances whatever, for, or on account of, the erection of the same." Two breaches were assigned: the first alleging a failure to conform to the plans and specifications, and the second charging that the defendant had permitted the enforcement of a mechanic's lien in favor of one Rogge, upon which plaintiff was compelled to pay $346.10, and also of another, in favor of Wright & Breckenridge, upon which plaintiff was compelled to pay $651.44. The petition prayed judgment "for said 5,070 dollars debt, and for 1,500 dollars damages."

The answer admitted the contract and bond, but denied

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the alleged breaches. It denied that "said plaintiff duly performed all the conditions of said contract or of said writing obligatory on his part to be performed." It denied that defendant Dette had failed to keep the building free from liens, as charged; admitted that plaintiff had paid to Rogge and to Wright & Breckenridge the sums stated, but charged that this was due to plaintiff's own default, and denied that plaintiff suffered any damage thereby. As to the Rogge lien, the answer alleged that it arose on account of extra brick furnished outside of the contract; that "said Dette fully paid said Rogge at once for all sums of money that he was liable to pay under said contract, leaving only the extra brick unpaid; and said Wagner, failing and refusing either to pay said Dette *what was due him under said contract*, or said Rogge for said extra brick, said Rogge instituted suit against said building on a mechanic's lien, and said plaintiff paid, as defendants believe, the amount, and has received credit therefor, and for all amounts paid in anywise upon said building." (It may be proper to remark that, where the word "plaintiff" last occurs, the word "Rogge" appears in the transcript, by a manifest clerical error.)

The answer further avers "that, when said building was nearly finished, said plaintiff told said Dette to give orders to all material men for such amounts as they might be entitled to when their work was completed, and that he would accept and pay such orders, which would then constitute credits against said Dette's account with said Wagner; that, in accordance therewith, he gave orders to certain material men when their claims became due, and, among the rest, to the firm of Wright & Breckenridge, which order said Wagner *duly accepted*, and paid thereupon the sum of $300 on account thereof, whereupon said Dette duly credited said Wagner with the amount of said accepted order in his bill against him, and said Wright & Breckenridge duly receipted to him, said Dette, for the amount of the same;

that, believing that said orders would be paid, he delivered the possession of said building, when completed, to said Wagner, who duly accepted the same, and who has so held the same ever since; that thereafter said plaintiff *failed and refused to pay said order* so accepted by him as aforesaid, whereupon said Wright & Breckenridge instituted a suit, by mechanic's lien, against the said premises, and the said plaintiff paid the amount of the recovery therein, which is the amount stated in plaintiff's petition.

"These defendants state that there are no liens or incumbrances of any kind now existing, or due or unpaid, created by any act of said Dette under said contract, against said building; that the amount of eight hundred and ninety-five 69-100 dollars is now due him on account of work done and performed by him on said building for said plaintiff, and which plaintiff refuses to pay; wherefore they ask to be discharged with their costs."

Plaintiff's reply put in issue the new matters set up in the answer. The verdict was in defendants' favor, upon the first breach assigned in the petition, and hence we need not notice the points saved relating to that. The bill of exceptions informs us that, on the trial, "the defendants offered to prove that at the time that plaintiff paid the respective sums—the mechanics' liens, to Rogge and to Wright & Breckenridge—there was then due and owing to said defendant, by plaintiff, on account of the contract mentioned in the petition, more than enough to cover the said two amounts so paid, and, further, to prove that there was money in his (plaintiff's) hands, owing to defendant Dette, on account of said contract, more than sufficient to discharge the amounts so paid by him; which being objected to by the plaintiff, such objection was sustained by the court, to which the defendant excepted at the time."

Carrying out the theory upon which, apparently, this testimony was excluded, the court instructed the jury for the plaintiff as follows:

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"The court instructs the jury that, in making their verdict in this case, they are not authorized to consider the question whether Wagner has or has not paid to Dette the contract price for the building of the house, nor the question whether or not Dette did extra work in building the house mentioned in the pleadings.

"The court further instructs the jury that it is admitted, by the pleadings in this cause, that the defendant Dette suffered Louis Rogge and Messrs. Wright & Breckenridge, respectively, to fasten material-men liens upon the building mentioned in the pleadings, for materials furnished in and about the construction of said building—Rogge for the sum of 346 dollars and 10 cents, and Wright & Breckenridge for the sum of 651 dollars and 44 cents. And it is further admitted by said pleadings that said lienors respectively recovered judgment in this court for the enforcement of their respective liens against the defendant Dette, as contractor, and this plaintiff, as owner, of said building.

"And the court further instructs the jury that the suffering of said liens and the recovering of said judgments was, and is, a breach of the condition of the bond sued on. And the jury are further instructed that, if they believe from the evidence in the cause that the plaintiff, prior to the institution of this suit, paid and satisfied said liens, they should find for the plaintiff on the second breach assigned, and assess his damages therefor; and that the measure of the plaintiff's damage, in that case for said second breach, is the amount paid by him in discharge of said liens, and interest on the sums paid, computed at the rate of six per cent. per annum, from the time or times of payment until the present time."

Defendants asked for several instructions which the court refused to give. Among them was the following:

"The court instructs the jury that, as this action is based upon the breach of a bond for faithful performance of a contract for building, given by defendant to plaintiff, and

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for damages sustained by plaintiff by reason of such alleged breach, that the burden is on plaintiff to show affirmatively, not only that he paid the amounts of the liens read in evidence, but that, by reason of such enforced payments, he was damaged, and the extent thereof. And if the jury believe from the evidence that said plaintiff has received a full consideration for the money so paid, in the way of work and labor, and materials used, in erecting a building for him by defendant Dette, and that said sums so paid were not in excess of what was owing by him to said Dette, and that he has not paid in excess of the cost of the work and labor, and materials furnished and used, in the house so built for him, then the court instructs the jury that the plaintiff has sustained no damage for which he can recover in this action on said second assignment of breach of the bond sued on."

It would thus appear that, in the opinion of the Circuit Court, the plaintiff, as the case stood, was entitled to recover for a technical breach of the bond sued on, though no injury to him resulted therefrom; and that the measure of his recovery would be the sums which he had paid, even though he justly owed every dollar of them, and their payment necessarily went to the diminution or extinguishment of his indebtedness. Such a proposition should be supported by some rule of positive law, direct, unequivocal, and absolute, whose authority will override every suggestion of common justice and fairness among men.

Plaintiff's counsel justify the exclusion of the testimony on the ground that it was "not pertinent to any issue in the cause." We think that the passages above quoted from the answer, upon each of which a distinct issue was taken in plaintiff's reply, furnish a sufficient refutation of this assumption. These specific statements of fact were perhaps objectionable, or rather unnecessary, as presenting the evidence which was to prove the conclusions whereon defendants relied. But they undoubtedly presented the conclusions also, to wit: that, as to the Rogge lien, when

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that suit was instituted, plaintiff was refusing "to pay said Dette what was due him under said contract;" that plaintiff had received a credit for the sum paid, and yet was still indebted to Dette on the contract. As to the Wright & Breckenridge lien, plaintiff's acceptance of Dette's order was an acknowledgment of indebtedness existing. His refusal to pay the acceptance kept the indebtedness alive up to the moment when he paid off the lien. Such was the effect of the allegations in the answer, each of which was controverted by the plaintiff. If the defendants had proved them true, they would have done precisely what they offered, but were denied the privilege of doing. It cannot be said that the answer tendered these issues with the distinctness or the perspicuity which should be held essential to good pleading. But, no objection having been taken to any matter of form, we cannot ignore what is manifestly present, because we may deem it to have been unskillfully set before us.

Plaintiff's counsel insist that defendants cannot avail themselves of the fact of indebtedness by plaintiff to defendant Dette, under any circumstances, because it is not pleaded as a set-off. We do not perceive either the fact assumed or the logical result which counsel would infer. It seems to be supposed that, without a prayer for affirmative judgment in defendant's favor, there cannot be a defense of set-off. But no such rule exists. Suppose that A sues B upon a promissory note for $1,000. B admits the execution of the note and the sufficiency of the consideration, but, averring that he holds a note executed in his favor by A for $500, asks that this sum be applied in reduction of the amount which A would otherwise recover. Is this defense any less a set-off, because B cannot ask for a judgment against A upon the $500 note?

But let us suppose that, for some technical reason, the counter-indebtedness here pleaded cannot be called a set-off. Is there no other name or description under which it

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may be established in the proofs? As a *recoupment* it would seem to fit the strictest definition of that term, as formerly used, and as still understood in some of the States. In this form the defense admits the plaintiff's right of action, but alleges that he also has committed breaches of the same contract, to defendant's injury, and that these should be considered to reduce the amount of plaintiff's recovery. The defendant will thus get no benefit of any excess in his favor, but must suffer judgment, though it may be for only a nominal sum. Such was once the limited office of recoupment, though latterly its sphere is much enlarged. In the present case the defendants admit the breaches, with reference to the mechanics' liens, but allege the plaintiff's failure to perform his part of the contract as a reason why his damages should be reduced.

The manifest object of the stipulation concerning mechanics' liens was to secure the plaintiff and his property against liability for work or materials after he had once paid the contractor for everything done or furnished about the building. If liens should arise, compelling further payments to third parties, after he had finally settled with the builder, surely the plaintiff's loss would be greater than it would be if he might deduct the amount of such payments from a balance still due and unsettled. Yet the Circuit Court refused to recognize any difference between the two cases. Here was a striking departure from the rule by which a plaintiff, whatever may be his abstract right of recovery, can yet recover only so much money as will indemnify his losses or restore his rights. It is clear that, upon every principle by which courts assume to administer justice between contending parties, the defendants were entitled to prove that the amount of damages actually sustained by the plaintiff was not truly represented by the sum which he had paid in discharge of the liens.

The exclusion of defendants' testimony, and the action of the court upon the instructions given and refused, were

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concurrent illustrations of the same inadmissible principles, as inducing both. For the errors thus appearing the judgment must be reversed and the cause remanded. All the judges concur.

Hanna W. Bergmann, Respondent, *v.* The St. Louis Life Insurance Company, Appellant.

May 16, 1876.

1. Where an insurance company has so dealt with the insured as to induce a belief that the clause of forfeiture for non-payment of interest on a premium note will not be insisted upon, there will be no forfeiture if payment be tendered within a reasonable time.
2. But, where no tender of the interest is made for three months, and the insured dies without having made a tender, the clause of the forfeiture will be enforced.

Appeal from St. Louis Circuit Court.

Reversed and judgment.

Davis & Smith, for appellant, cited: Bouton *v.* American Mutual Life Ins. Co., 25 Conn. 542; Helme *v.* Philadelphia Life Ins Co., 61 Penn. 107; Bliss on Ins. (2d ed.) 312; Edge *v.* Duke, 18 Law Jud. Eq. 183; Pritchard *v.* M. & T. Life Assur. Soc., 3 C. B. (n. s.) 622; Mutual Benefit Life Ins. Co. *v.* Ruse, 8 Ga. 534; Howell *v.* Knickerbocker Life Ins. Co.; Latham *v.* Westervelt, 26 Barb. 256; Chapin *v.* Potter, 1 Hilt. 366.

Eccles & Smith, for respondent, cited: Helme *v.* Philadelphia Life Ins. Co., 61 Penn. 107; Young's Admrs. *v.* Mutual Life Ins. Co., 4 Big. 1; Ripley *v.* Ætna Ins. Co., 29 Barb. 557; Goit *v.* National Ins. Co., 25 Barb. 186; Baker *v.* Union Life Ins. Co., 6 Robt. 394; Boehm *v.* Williamsport Ins. Co., 35 N. Y. 131; Mayers *v.* Mutual Life Ins. Co., 4 Big. 62 *et seq.*

Bakewell, J., delivered the opinion of the court.

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This was an action on a policy of insurance, dated April 23, 1867, by which defendant, in consideration of $214.80 then paid, and of the annual premium of $214.80 to be paid on or before April 23d, for nine years next succeeding the date of the policy, did insure the life of August H. Bergmann in the sum of $4,000, the amount of insurance to be paid to plaintiff on April 23, 1896, or, should the insured die before that date, then to pay the same in ninety days after due notice and proof of death.

The policy contains two provisos: (1) That, if default is made in the payment of any of the annual premiums at the date they become due, this shall not work a forfeiture of the policy; but the amount insured shall be commuted to such proportional part of the whole sum insured as the annual payments actually paid shall bear to the sum of the annual payments agreed to be paid. (2) If the insured shall fail to pay annually, in advance, the interest on any unpaid notes or loans which may be owing by said insured to said company on account of any of the above-mentioned annual premiums, at the office of the company, in the city of St. Louis, or to agents when they produce receipts signed by the president or secretary, then, and in every such case, the company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

Bergmann died on July 18, 1873. He made no payment on account of the policy after April 23, 1872. The testimony showed that, at the time the policy was taken out, there was paid in cash $107.40, and a note for $107.40 was given, on which interest was paid in advance for one year, at 6 per cent. In April, 1868, another note was given for $107.40, and a cash payment made of $107.40, and also interest was paid in advance on the two notes. In 1869 $107.40 was paid, a new note given, and interest paid in advance on three notes. In 1870 the same cash payment was made, the old notes were surrendered by the company,

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and a new note given for $414.62, being four times $107.40, less a dividend deducted, and interest was paid in advance. In 1871 the same cash payment was made, the old note was surrendered, and a new note taken for $506.80, on which interest was paid in advance. In 1872 the cash payment was made, the old note surrendered, a new note for $614 was taken, and interest paid in advance for one year. The premiums were paid on the day they were due in 1869 and 1872. In 1868 they were paid two days before they were due; in 1871, one day after, and in 1870, two days after they were due. Up to 1872, the company always sent notice to deceased when the premiums were due. No notice was sent of the premium due in 1873. Some time between the time when the last premium became due and the date of his death, deceased said that he had received no notice, and supposed the company wanted no money till their troubles were over. He also said he guessed he would not pay any more money till the company got through their troubles, and then he would see how they got along. The jury found for the plaintiff, in the sum of $2,586. A motion for a new trial was made, and, upon plaintiff remitting $214.80, was overruled, and judgment entered for $2,371.20. Defendant excepted, and appeals to this court.

It is clear that the defendant in this case had so dealt with deceased as to induce a belief that the claim of forfeiture would not be insisted upon, in case payment was not made on the exact day; and had payment been tendered and refused, within a reasonable time, there would have been no forfeiture. The stipulations in the contract, as to time of payment, were not considered as of its essence, and the contract did not become void because the interest was not paid on the very day. The acts and conduct of the parties themselves gave the contract this construction. This is settled in Missouri. But no tender of the interest was made at any time. Three months elapsed without a tender, and meanwhile the insured died. In not paying at

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the exact time, he took the risk of death occurring in the interval. It does not appear that he ever offered to pay, or that he intended to pay. It does appear by the testimony of plaintiff's own witness, a son of deceased, that he knew his interest was due, adverted to the fact, and resolved to pay no more in the then existing condition of the affairs of the company.

To hold, under such circumstances, that the policy was in force at the time of his death, in the face of the express proviso that it determines on failure to pay the interest annually in advance, is to go much further than the courts have yet gone in doing away with forfeiture. It cannot be permitted that contracting parties shall thus play fast and loose. The provision for prompt payment of interest, in policies such as the one before us, is a most wholesome one, and, if it may be utterly disregarded, life insurance, on the popular system represented by this policy, will be at an end. Were it a question of public policy, it would be against public policy to allow a recovery under such circumstances as these. But it is not a mere question of policy. There was no question here of the deceased being thrown off his guard. He knew his interest was due; he had not forgotten it. He chose not to pay it, and was not in the disposition to tender it. He was waiting to see what would turn up. It is a misfortune for his legal representatives; but courts sit to enforce lawful contracts, and to see to it, in the case brought before them, that no one be deprived of his property without due process of law. We can no more sanction this verdict and judgment than we could decree the payment of this insurance money had the deceased died before the contract was completed.

The verdict and judgment of the Circuit Court must be set aside, and it is so ordered; and judgment is here entered for the defendant. All the judges concur.

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D. A. JANUARY, Respondent, v. FANNY B. STEPHENSON, Appellant.

May 16, 1876.

1. A landlord's right to evict a non-paying tenant under the "Landlords and Tenants" act (Wag. Stat. 877) will not be affected by the fact that the lease is held by a trustee for another. The landlord has no concern with the condition of the trust, and no occasion for equitable inquiry into it. The trusteeship merely serves to describe the person with whom he has contracted.
2. The jurisdiction of a justice of the peace, for the purpose of restoring possession to the landlord, covers all cases of rent in arrear, without reference to the amount claimed. But the additional power to render judgment for the sum due from the tenant is limited by the general law regulating the jurisdiction of justices of the peace in suits for the recovery of money.

APPEAL from St. Louis Circuit Court.

Affirmed.

R. S. Voorhis, for appellant.

W. F. Boyle, for respondent, cited: Willi *v.* Peters, 11 Mo. 395; Sheppard *v.* Martin, 31 Mo. 492; Harley *v.* McAuliff, 24 Mo. 85; Sweeney *v.* Mines, 31 Mo. 240; Walker *v.* Northern C. M. Co., 5 De G., M. & G. 629; Wag. Stat., ch. 85, sec. 32.

LEWIS, J., delivered the opinion of the court.

This is a proceeding under the "Landlords and Tenants" act, to recover possession of leased property for non-payment of rent. Wag. Stat. 882, secs. 32, and following. The complaint was in due conformity with the statute, and was originally filed against the present defendant and John B. Gibson as her trustee. At the hearing before the justice the suit was dismissed as to Gibson, and judgment was obtained by plaintiff for possession of the property and costs of suit.

In the Circuit Court, on defendant's appeal, the cause was submitted on a motion to dismiss, accompanied by an agreed statement of facts, which included a copy of the

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lease. It thus appeared that, on April 2, 1860, plaintiff leased the premises to James N. Stephenson and John B. Gibson, trustees for Fanny B. Stephenson, for a term of forty years, with sundry stipulations as to payments of rent, etc., of no material significance in this controversy; that James N. Stephenson had died before the institution of the suit; that the defendant had come into possession of the premises under the lease referred to, and was so in possession at the commencement of the suit; that the sum of $300 was due for rent, and that payment thereof had been demanded of defendant by plaintiff's agent, and was refused. The court overruled the motion to dismiss, and rendered judgment in plaintiff's favor for possession of the premises, and 1 cent damages.

Defendant claims that the justice had no jurisdiction of the cause, because "the leasehold is purely a trust estate, created by deed, and is peculiarly within the province of equity jurisdiction." It is argued that the proceeding should be by "bill in equity, where all the parties to the deed can be brought in, and their respective rights adjusted upon the forfeiture declared."

If there were here any controversy between the trustees and the *cestui que trust*, there might be some ground for the position assumed. But the landlord is simply pursuing a statutory remedy upon his lease, in which he knows nothing of any trusteeship, except as it may serve to describe the person with whom he has contracted. "The relation between the owner of land and those who occupy it is of a purely legal character. The circumstance that there is a relation of an equitable character subsisting between the lessee and the actual occupier cannot give any equitable rights to one who claims by a title paramount both to the trustee and the *cestui que trust*. Whatever be the relation between the lessee and the occupier, the landlord's rights are unaffected." *Walters* v. *The Northern C. M. Co.*, 5

De G. M. & G. 641. Defendant's position cannot be sustained.

It is further claimed that the proceeding should have been dismissed because the amount of rent in arrear, according to the complaint, was $300, and so above the jurisdiction of the justice. This claim is equally inadmissible. The suit was not for recovery of the money due, but for possession of the rented premises. The 32d section of the statute provides thus: "In all cases in which lands and tenements are, or shall be, rented or leased, and default shall be made in the payment of the rents at the time or times agreed upon by the parties, it shall be lawful for the landlord to dispossess the tenant and all sub-tenants, and recover possession of the premises rented or leased, in the manner hereinafter provided." Here is a specific declaration of the primary object of the law. It has no reference to the amount of the unpaid rents, and no limitation as to value, or terms of renting. The remedy is to cover "all cases in which lands and tenements are, or shall be, rented or leased." The succeeding provisions indicate the processes of application; among them, the "justice shall issue a summons, directed to such tenant or lessee, and to *all persons occupying the property*, by name, requiring them to appear before him, upon a day to be therein named, and show cause why possession of the property should not be restored to the plaintiff."

As the law was first enacted, in 1845, the remedy ended substantially with the restoration of possession to the landlord. In the revision of 1865 the recovery was enlarged by addition of the words, "and also his (the landlord's) debt for the amount of the rent then due; *provided*, that the amount of the rent shall not exceed the jurisdiction of a justice of the peace, with all costs, etc. It is here argued that this proviso applies to the whole remedy, and cuts off the justice's jurisdiction, for any purpose, if the tenant be more than $200 in arrears upon his rents. But that would

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be a novel method of interpretation by which the introduction of an additional measure of relief, with a limiting proviso, should unsettle the terms of the ancient remedy, to which no such proviso was ever attached. Nothing is said to indicate a change of policy in the law, except in so far as the plaintiff may recover something more than he could before the revision. No accepted rule of statutory construction will apply this jurisdictional proviso to any part of the remedy, except that in connection with which it was first introduced. The meaning of the whole law is that the landlord may, "in all cases" contemplated in the 32d section, recover possession of the rented premises. But he can have judgment, also, for "the amount of the rent then due," in those cases only wherein "the amount of the rent shall not exceed the jurisdiction of a justice of the peace," by the general law establishing the amounts of recoveries in money to which that jurisdiction may extend. In the present case the law was so applied, and strictly obeyed. We think there is no error in the record, and that the judgment must be affirmed. All the judges concur.

JAMES S. SMITH, Respondent, *v.* THOMAS W. B. CREWS, Appellant.

May 16, 1876.

2	[illegible]
40	300
2	260
57	610
2	269
102	714

1. Gross misconduct of a financial agent, in the matter of keeping accounts, forfeits all right to compensation.
2. Where a referee finds as a fact that a financial agent has grossly neglected his duty by failure to keep proper accounts and vouchers, it is error to allow him his salary.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

W. C. Bragg, for appellant, cited: Ely *v.* Ownby, 59 Mo. 437.

G. W. Bailey, for respondent, cited: W. B. Benevolent

Assn. *v.* Kribben, 48 Mo. 37; Frang *v.* Dietrick, 49 Mo. 95; Maguire *v.* McCaffrey, 24 Mo. 552; 2 Pars. on Con. (5th ed.) 528.

BAKEWELL, J., delivered the opinion of the court.

This is an action on a written contract. In the first count of his petition plaintiff claims a balance of $359 for wages due him, under the contract, as master of the steamboat "Evening Star." In the second count plaintiff claims $4,155 for moneys advanced by him, according to the terms of the contract, for the benefit of defendants, for supplies, materials, and labor furnished to the boat, according to an itemized account filed with the petition.

Defendant Crews (the only defendant who appeals) files a separate answer, in which he denies all indebtedness; charges that plaintiff received and retained $45,000 of money belonging to defendants, as owners of the boat; that he refuses to account, and withholds papers and vouchers of the boat, and has now in his hands large sums, amounting altogether to $50,000, belonging to the defendants; and prays for an account.

The replication denies the new matter in the answer, and states that the receipts of the boat, whilst in plaintiff's charge, exceeded her earnings.

The case was referred, by consent, to a referee, who reports that neither plaintiff nor defendant are entitled to recover anything on balance of the boat's accounts, and that plaintiff is entitled to recover $359, the balance claimed by him for his services as captain of the "Evening Star."

Exceptions were filed to the report of the referee, which were overruled, and, a motion for a new trial having been filed and overruled, the cause is brought to this court by appeal.

The grounds of exception to the report are:

1. "That the referee erred in overruling the motion of defendants to require plaintiff to render an account of the boat."

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2. "That the referee erred in allowing plaintiff the wages claimed, as they were provided for in the written contract, and could not be separated from it."

Under this head the exceptor sets up that the grossly unfair dealing of plaintiff, in the matter of his accounts with defendants, as shown in the evidence, is a sufficient ground for disallowing his claim for wages.

1. The referee reports that he finds it impossible to determine, from the mass of contradictory testimony before him, which party is here bound to account to the other. There was some evidence that plaintiff was for a time driven from the boat, and the books taken from his possession. From the vouchers, letters, books, and testimony of experts before him, the referee states that he finds it impossible to state an account between the parties.

We cannot, under the circumstances, say that the referee committed an error in law in not requiring the plaintiff to render an account of the affairs of the boat, since an account, for whatever reason, had become, he says, impossible.

2. Whether, under the written agreement between plaintiff and defendants, the accounting for and paying over to the defendants, by plaintiff, the moneys received by him for them was a condition precedent to his recovery in this case, is a question that we cannot determine with absolute satisfaction to ourselves, owing to the state of the record. Though this is a suit on a written contract, and the contract itself is material to the determination of this question, error has been assigned on one side, and a joinder filed on the other, without any examination, apparently, of the record itself; for the page on which the contract between the parties should appear is left entirely blank, except for the title of the paper. However, as no words in a contract necessarily make a condition precedent, and as the intention of the parties, to be gathered from the whole instrument, is probably correctly set out in the pleadings, and in the statement of the contract made by the referee in his special findings, this

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is not, perhaps, after all, a matter of very great importance. It sufficiently appears that plaintiff was hired as master of the boat, at a certain monthly salary; that he was to pay a certain indebtedness of the boat, for which he was to be reimbursed, with 10 per cent. interest; that he was to manage the financial affairs of the boat, and account to defendants, her owners. This seems to have been the substance of the agreement between the parties, and proof of his performance of his duty in this respect cannot be held, under such an agreement, an indispensable prerequisite to the recovery of his salary, or of any part of it. The breach of the stipulation to account gives a right of action to the injured party; but the conditions were distinctly separable, so that much of what was agreed to be done could be performed on both sides as if the condition was not there; and this is laid down as the test of independent covenants. When the covenants are mutual, but independent, one party may maintain an action on the covenant to be performed by the other, without averring performance of the contract on his own part. The law has no preference for one kind of a contract over another, and will not make an independent covenant by implication or intendment. 6 Gray, 121; Willes, 157. We see nothing, then, in the contract, as presented to us by this record, which enables us to declare, as a matter of law, that the accounting required in the agreement was in such a sense a condition precedent to recovery by plaintiff; that, until the referee had found as an affirmative fact that plaintiff had accounted according to the contract, he could not allow to plaintiff any amount that might appear to be due as wages under the agreement.

3. Nevertheless, cases constantly occur of such gross neglect and misconduct by agents, in the matter of keeping accounts and vouchers, and managing financial affairs intrusted to them, as to amount to a complete forfeiture of all compensation. The report of the referee in this case shows that he finds from the evidence a state of facts to have

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existed such as to make it clear to us, as a matter of law, that the plaintiff was entitled to no compensation for his services. We quote from the referee's report:

"The testimony introduced by defendant tends to show that the books, as originally kept, would not show the true condition of the boat's accounts. Majors, one of the clerks, in his deposition, says plaintiff depended on him to keep his accounts of cash, and this could not be done, owing to the manner in which plaintiff kept his business. He says it was impossible to tell whether the bills and expenses of the boat were correct or not. Witness made his entries partly from his own knowledge, partly from what plaintiff told him. He says the books did not show the entire transactions of the boat. 'I can't tell,' he testifies, 'by the books, whether the owners of the boat owe Smith $3,000, or whether Smith owes the owners of the boat $3,000, as there were other transactions between them that were never put down, that the books don't show.'

"In point of fact it appears, from Smith's own testimony—and much stress is laid by him upon the fact—that the moneys paid out by him from his own private funds, and which he claims in this suit, were not entered upon the books of the boat at all. He makes frequent reference to a private memorandum-book—a black book which he says was left on the boat at Sioux City—which showed his private disbursements for the boat. It was kept by Majors and McFarland, in the clerk's office of the steamer. McFarland had charge of it. The entries in it, he testifies, were made up from vouchers. The payments drawn from Smith's private funds, for fuel, wages, etc., were not entered up under their appropriate heads in the books, because, by the terms of his contract, he was not required to so enter them. He swears that he had no debit and credit account with the boat, except for his own wages as captain. So it appears from his own testimony that, as to the disbursements claimed in this suit, the regular books of the steamer, if in evidence,

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would show nothing. As to this memorandum or black book, which was kept for plaintiff by the clerks, plaintiff says it was left on the boat at Sioux City. Defendant Crews, *contra*, says he never saw or heard of it. Majors, the clerk, testifies to a similar purport.

"It must be remembered, as a circumstance not favorable to plaintiff, that he kept no regular account of debit and credit, with defendant, on the books of the steamer, open to the inspection and examination of the owners. Such accounts most especially, it would seem, should be handed over to the owners, for examination, at the end of each trip, or, at all events, should be kept where they might be overhauled, instead of being kept in a pocket memorandum-book, where neither Crews nor the clerks, so far as it appears, ever heard of it.

"Plaintiff introduced a large number of vouchers, showing disbursements out of his own resources, for the boat, which, he says, furnishes the basis for the entries on the black book. The payments attested by them, in a number of instances, Crews says he paid himself. But, supposing them to be correct, they furnish only one side of the account. Plaintiff is shown to have had charge of the funds collected as well as paid out. What accounts are furnished of them? His testimony is that money taken in by him was regularly entered on the books of the boat, and that his vouchers, supplemented by the regular books, would show everything.

"But the books, in the view we take of the case, cannot be evidence. Majors can't tell anything from the books, as there were transactions between the parties not entered up in them, and it is not made to appear that the items left out were placed in the black book. So, in attempting to arrive at a result, from the books, in New Orleans, after the Red river trip, Smith made out two statements, about $900 apart, and Crews says the lesser estimate was over $100 out of the way. Again, at the Sioux City estimate, the computations differed widely. It would seem as though,

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if the books were in evidence, they would throw no very satisfactory light on the financial situation of the steamer.

"But an effort has been made, on the part of plaintiff, to show that he rendered sundry statements and balance sheets which, without reference to the books of the boat, gave a satisfactory exhibition of the profits and losses and general finances.

"Plaintiff says he rendered accounts at the end of each trip; that McFarland gave defendant a statement of what the boat had done; that statements were forwarded, showing the difference between receipts and disbursements. Defendant, *contra*, says he never got anything like a full statement, although he asked for one repeatedly; that Smith promised one, while in St. Louis, but, on account of his child's sickness, failed to give it. Defendant seems to have got a sort of statement, at New Orleans, of three trips up the Red river, which was made up in Jacobs' office while Smith was present. It appears that the books of the boat passed between Smith and Crews for two days, touching this statement. It was four or five pages of foolscap; showed everything, Smith says, but was misplaced.

"Crews says the statements were garbled, and he refused to accept them; that they were full of errors, which Smith admitted. These statements were attached together, marked 'Exhibit K 2,' and are herewith transmitted. They show that, on trip No. 1, the boat has earned $87.97; on trip No. 2, $294.33; on trip No. 3, had lost $479.05; afterwards another statement showed a loss of $1,396.50 on the same trip. The latter statement, Crews says, was grossly incorrect. The two *resumés* are about $900 apart. These papers might, perhaps, pass for statements, but not for accounts stated, upon which the business of plaintiff and defendants might be adjusted. So much for the Red river trip. As for the trip up to St. Louis, defendant testified that plaintiff told him the boat had made about $840, which would make her about even. After the boat arrived at St.

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Louis, Crews says, everything was in confusion, plaintiff promising to straighten everything out if he got time; that he demanded a settlement at Sioux City, and plaintiff promised to make one; that Smith and McFarland made out one, showing a balance from Smith of $750; that Smith said he had in his hands only $500; this, defendant says, plaintiff admitted. Defendant says McFarland's and Smith's account differed about $250; that Smith did not then claim that the boat owed him a cent. Majors, the clerk, testified, in his deposition, that McFarland made out a statement for Crews, at Sioux City, about the 5th or 6th of July, and it showed a balance in Captain Smith's hands of $2,160, or $2,200, and that Crews and Smith were both present; that Smith said the statement was wrong, but did not show in what particular; that Crews frequently, at Sioux City, asked for a settlement, and Smith said he was not prepared to make it. Majors qualifies his statement somewhat as to cash in the boat, by adding that the money may have been paid out for the boat. Benjamin Jeffries says that, in obedience to written instructions from Crews and defendant Garner, he tried to get a statement of the affairs of the boat while in charge of Smith, but received nothing but a verbal statement, in which Smith said the boat was making money. As for the statements, they show certain summaries as to amounts collected for freight, passengers, bar rent, etc., and amounts expended for fuel, wages, and the like, but the statements are not accompanied by vouchers or items of any kind with which to verify the results."

From the foregoing *resumé* it will be seen that the testimony of plaintiff and that of defendants is irreconcilable.

The parties, in many things, flatly contradicted each other. The books are incompetent, and plaintiff swears that the books showed a proper statement of affairs; whereas defendant and clerk, Majors, say they were incomplete and incorrect. According to Majors, a number of important items were left out of them altogether. So as to statements;

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plaintiff says they were full and satisfactory, while defendant and the clerks swear the other way. If testimony so conflicting proves anything, it would seem to show that, at the end of three trips on Red river, the boat owed Smith from $479 to $297, and a balance of $750 against plaintiff, on McFarland's settlement, at Sioux City. But no verdict could be found on the basis of such testimony as that herein given, touching the accounts between plaintiff and defendants. There is testimony—which, however, should perhaps be received *cum grano salis*—to the effect that plaintiff instructed one of the clerks, Majors, to keep the books falsely and fraudulently, in plaintiff's interest; that he made out sham vouchers for money represented to have been paid out by him, upon which entries were made by the clerk; that boat stores were traded for Indian wares and buffalo robes; that receipts were sometimes not accounted for; that moneys were used by plaintiff in gambling, etc.

But this testimony is so vague, vacillating, and contradictory as to be entitled to but little weight. The referee found some difficulty in passing upon the evidence in this case, but has come to the conclusion:

1. That plaintiff was bound, in the first instance, to show the balance claimed from the books of the steamer.

2. That he failed to make out such a case of loss, destruction, or removal, beyond his control, of the books of the boat, as to justify secondary or *ex parte* testimony touching his accounts and expenditures.

3. That his books, even, if admitted in evidence, would not show a complete exhibit of the steamer's finances.

4. That these deficiencies would not, so far as appears from the evidence, be remedied by proof as to the vouchers offered in evidence.

5. That the proof fails to show complete or satisfactory statements, or such as were accepted by defendants as correct, nor any admissions of an indebtedness, by letter or otherwise, to plaintiff on the boat's account.

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The referee then proceeds to find that neither plaintiff nor defendant are entitled to receive anything on balance of the boat's account; but, in consideration that the services of plaintiff were rendered as captain, the referee finds a verdict for the amount charged by him for his services in this respect.

As to this the referee says: "It must be a case of gross misconduct which would prevent one in his position from recovering his salary."

The evidence in the case, as set out by the referee as the basis of his finding, the sworn statements of plaintiff himself, and the facts actually found by the referee, show a case of gross neglect on the part of the plaintiff which amounts to fraud in law.

An agent must keep an account of his payments and receipts. One of his most important duties is to render just accounts; and if it appears affirmatively that an agent, managing the business affairs of another, did not keep regular accounts and vouchers, and that, by reason of this neglect, an account of his disbursements and receipts cannot be made out with any approach to accuracy, he will not be entitled to compensation. Any other rule would open wide the door to fraud.

Courts will go to great lengths in holding agents to the strictest fairness and integrity; and in the case where agents have been allowed to recover without accounting, the facts show that the agent had been acting in transparent good faith, and that there was no possibility of fraud on the principal.

The finding of a referee stands as the verdict of a jury, and will not be set aside because it is against the weight of the evidence. Indeed, we will not weigh the evidence at all, and, where there is any evidence to sustain the verdict, we will suppose that the whole evidence was properly weighed, and the requisite effect given to it.

Where the evidence greatly preponderates against the

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verdict, the trial court may grant a new trial; but, if it refuses to do so, this court cannot interfere, for such action is no error of law.

But when, as in this case, it is apparent, from the face of the report of a referee, that the decision is erroneous, it is error in the court below to confirm the report, and the judgment will be set aside.

It is insisted by respondent that a petition for review should have been filed in the court below, stating all the facts found as against evidence, and all the evidence to support them, and that, this not having been done below, it is not a matter for consideration here whether or no the facts warrant the finding of the referee. The decisions to which he refers as supporting this view are based upon provisions in the code of practice adopted in 1849, which are no longer in force.

From the evidence as detailed by the referee in his report, and from his finding of facts, it is quite clear that plaintiff, having kept no proper account of his receipts and disbursements, has been faithless to his first and most essential duty as the employee of defendants, and cannot, therefore, as a matter of law, recover for services rendered to them in a capacity which made the receipt and payment of moneys to large amounts one of his main duties.

The trial court, for this reason, should have set aside the report of the referee, and it was error not to do so. The finding of the referee and the judgment in this cause are therefore reversed, and the cause remanded. All the judges concur.

HAWKINS WICKERSHAM, Defendant in Error, *v.* JOHN W. JARVIS *et al.*, Plaintiffs in Error.

May 16, 1876.

1. The payee and holder of a note, indorsed in full to a third party, is not on that account obliged to prove ownership of the note.

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2. Where no issue of usury, or no usury has been found, it is prefectly immaterial, as affecting plaintiffs' right to recover the full amount due on a note and costs, what the evidence may show as to the amount of interest paid or agreed upon.

Error to St. Louis Circuit Court.

Affirmed.

J. B. Goff and *Robert Percival*, for appellants, cited: Wag. Stat. 783, sec. 5; Farmers & Traders' Bank *v.* Harrison, 57 Mo. 503; Wag. Stat. 835, sec. 39.

Fisher & Rowell, for respondent, cited: Page *v.* Lottroch, 20 Mo. 589; Glasgow *v.* Switzer, 12 Mo. 395; White *v.* Grey, 32 Mo. 447; Roosburg *v.* Pacific R. R. Co., 45 Mo. 236; Merchants' Bank *v.* West, Exr., 45 Mo. 310; Norch *v.* Divise, 4 Mo. 626; Hoyles *v.* Ellison, 5 Mo. 110; Gamble *v.* Hamilton, 7 Mo. 469; Forks *v.* Sewlin, 4 Mo. 18; Barge R *v.* Brook, 10 Mo. 531; Gould *v.* Smith, 48 Mo. 43; Wilson *v.* North Missouri R. R. Co., 46 Mo. 36.

Bakewell, J., delivered the opinion of the court.

This was a suit on a negotiable promissory note for $220, made to the order of plaintiff by J. W. Jarvis & Brother, payable sixty days after date:

The suit was commenced by attachment, before a justice of the peace.

On trial in the Circuit Court no instructions were asked, and no exceptions saved to any ruling of the court. There was a verdict and judgment for plaintiff for the total claim and costs. A motion for a new trial being overruled, the cause is brought before us by appeal.

There was some evidence to sustain the verdict, and we cannot look into its weight.

The note was indorsed in full to the North St. Louis Savings Association. This indorsement, the payee and holder of the note might, if he had so chosen, have stricken out; but the fact that he did not do so did not make it necessary for him to prove that he was owner of the note, as defendant's counsel contended. This is well settled law.

Defendants further insist that it affirmatively appeared on

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trial, by uncontradicted evidence, that the note was given to plaintiff by defendant John W. Jarvis, in consideration of $200; that usurious interest was therefore charged, and that, under the statute, judgment should have been rendered only for the principal, and interest at 10 per cent., the interest to be paid to the school fund, and that judgment should have been given in favor of defendants for costs,

The record does not show any finding of fact as to the question of usury. When a court sitting as a jury, or a jury, find usury as a fact, then, and not till then, the provisions of the statute as to the amount of recovery, the disposition to be made of the interest, and the judgment for costs, apply.

There are no pleadings in a suit on a note before a justice of the peace; but, if this defense is to be made before a justice, it would seem that something in the nature of an answer must be filed. If the defense is to be made on the trial anew in the Circuit Court (as a defense may be made, on the trial of an appeal, which was not made before the justice), the question, we suppose, might be submitted to the jury by an instruction, though no such issue had been made below. But where there is no issue of usury, or no usury, in any way made and submitted to the triers of the fact, it is perfectly immaterial, as affecting the plaintiff's right to recover the full amount due on the note, and costs, what the evidence may show as to the amount of interest paid or agreed to be paid.

There is nothing preserved in this record on which we can pass, and we do not know why parties should go to the trouble and expense to bring such a record before us. The judgment of the Circuit Court is affirmed. The other judges concur.

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ALBERT G. EDWARDS *et al.*, Appellants, *v.* MARY THOMAS *et al.*, Respondents.

May 16, 1876.

1. If one who has authority to sign and indorse mercantile paper for another, without authority makes or indorses paper for the accommodation of a third party, the purchaser of such paper will be held to inquiry as to the authority of the agent, if any circumstances are brought to his notice which would arouse the suspicion of a prudent man as to the authority of the agent.
2. The fact that the agent's name in such case appears as last indorser on the paper is a circumstance strongly indicating that the paper was made for his benefit, and the proceeds to go to him.

APPEAL from St. Louis Circuit Court.

Affirmed.

John G. Chandler, for appellants, cited: 2 Greenl. on Ev., secs. 60, 61; Story on Ag., secs. 45–50, 73, 140; Cobbs *v.* Lunt, 4 Greenl. 503; Dow *v.* Greene, 16 Barb. 72; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546; Hoyt *v.* Thompson's Exr., 19 N. Y. 208, 219; Bank of United States *v.* Dandridge, 12 Wheat. 64, 70; Barbour *v.* Watts, 2 A. K. Marsh. 290; Pike *v.* Dyke, 2 Greenl. 213; Story *v.* Gowan, 18 Me. 174; Taylor *v.* Whiting, 2 B. Mon. 268; Phillips *v.* Greene, 5 T. B. Mon. 344; Orr *v.* Foote, 10 T. B. Mon. 387; 2 Ph. on Ev. (5th Am. ed.) 632–739, note 514; Exchange Bank *v.* Montieth, 17 Barb. 171; North River Bank *v.* Aymer, 3 Hill, 262, 272; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 14 N. Y. 623; Griswold *v.* Haven, 25 N. Y. 595, 599, 602, 603; New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30, 66; Smith *v.* Clark County, 54 Mo. 58, 77; 1 Pars. on Notes & Bills, 108; Bank of Bengal *v.* Maclead, 7 Moo. P. C. C. 35; Bank of Bengal *v.* Fagan, 7 Moo. P. C. C. 61; North River Bank *v.* Aymar, 3 Hill, 262, 266, 267; Mechanics' Bank *v.* New York Railroad, 13 N. Y. 623; *Id.*, 16 N. Y. 125, 131, 135, 136; Griswold *v.* Haven, 25 N. Y. 595; Exchange Bank *v.* Montieth, 26 N. Y. 505; State of Illinois *v.* Delafield, 2 Hill, 159;

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Westfield Bank *v.* Cornen, 37 N. Y. 320; Bird *v.* Daggett, 97 Mass. 494; Madison & Indianapolis R. R. Co. *v.* Norwich Savings Soc., 14 Ind. 457; De Voss *v.* Richmond, 18 Gratt. 338; 2 Kent's Com. (12th ed.) 621, note; Fairlie *v.* Hastings, 10 Ves. 123, 126, 127; 1 Ph. on Ev. (5th Am. ed.) 507, 508, 516; Perkins *v.* Burnet, 2 Root, 30; 1 Greenl. on Ev., secs. 27, 41, 208, 217; Graff *v.* R. S. R. R. Co., 31 Penn. 496; Kerr on Fraud, 111, 238, 239, 256; Wilson *v.* Fuller, 3 Q. B. 77; Goodman *v.* Simmons, 20 How. 343, 362–367; 1 Story's Eq., sec. 400, *a;* 1 Pars. on Notes & Bills, 260, 477, 502; Perkins *v.* Challis, 1 N. H. 254; Story on Prom. Notes, secs. 197, 310; Hamilton *v.* Marks, 52 Mo. 78–80; Horton *v.* Bayne, 52 Mo. 531; Lemoine *v.* Bank of North America, 1 C. L. J. 529; 1 Pars. on Con. 71, 253; Bank of Columbia *v.* Lawrence, 1 Pet. 578; Lewiston Falls Bank *v.* Leonard, 43 Me. 157; Sanderson *v.* Reinstadler, 31 Mo. 483; Bank of Columbia *v.* Lawrence, 1 Pet. 578; Williams *v.* United States Bank, 2 Pet. 96, 101; Edson *v.* Jacobs, 14 La. 494; Jones *v.* Mancker, 15 La. 51; Lord *v.* Appleton, 15 Me. 270; Commercial Bank *v.* Gove, 15 La. 113; Bank of United States *v.* Merle, 2 Rob. (La.) 117; Jacobs *v.* Turner, 2 La. An. 964; Hazard *v.* Treadwell, Stra. 506; Spencer *v.* Wilson, 4 Munf. 130; Story on Part., sec. 16; Pope *v.* Risley, 23 Mo. 186; Edw. on Bills (2d ed.), 612; Bank of Utica *v.* Phillips, 3 Wend. 408; Bank of Utica *v.* Davidson, 5 Wend. 587; Union Bank of Tennessee *v.* Govan, 10 Smed. & M. 334; Cocke *v.* Bank of Tennessee, 6 Humph. 51; Dabney *v.* Stidger, 4 Smed. & M. 749; Fourth Nat. Bank *v.* Henschen, 52 Mo. 207; Coll. on Part., secs. 195, 384, 601, 603; Greeley *v.* Wyeth, 10 N. H. 16; Barbour *v.* Watts, 2 A. K. Marsh. 290; Pike *v.* Dyke, 2 Greenl. 213; Story *v.* Gowan, 18 Me. 174; Phillips *v.* Green, 5 T. B. Mon. 344; Weidler *v.* Farmers' Bank of Lancaster, 11 Serg. & R. 134; Rowt's Admr. *v.* Kile's Admr., 1 Leigh, 216, 223, 224; 1 Ph. on Ev. (5th Am. ed.) 619, 620, 732, 736–738; Hayward *v.* National Ins. Co.,

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52 Mo. 181; Mechanics' Bank *v.* Schaumberg, 38 Mo. 228.

D. T. Jewett and *Krum & Madill*, for respondents:

Bakewell, J., delivered the opinion of the court.

This is a suit brought by plaintiffs, copartners as Edwards, Mathews & Co., against the defendants as members of a copartnership known as the Sectional Dock Company, upon a negotiable promissory note for $3,000, dated March 19, 1873, payable, four months after date, to the order of the Sectional Dock Company, with interest from maturity at 10 per cent. per annum. The note is indorsed "Sectional Dock Co., by, Charles Drew, jr., Fin. Agnt., Charles Drew, jr.," and is made by Thomas P. Morse, and John D. Daggett.

The petition alleges that defendants, together with John D. Daggett, Ann Eliza Hartshorn, wife of Saunders W. Hartshorn, and Robert C. Rogers, executor of Patrick Rogers, were copartners as stated, Eliza Hartshorn's interest in the firm being a separate estate, and John D. Daggett being her trustee.

The necessary averments are made in the petition, and all the allegations in the petition, except copartnership of plaintiffs, are denied by the separate answers of defendants, which are verified by affidavit.

The case was tried by the court without a jury. Judgment was for defendants, and, the usual motions having been filed and overruled, the cause is brought here by appeal.

It appeared, on the trial, that, more than thirty years ago, a partnership in the business of repairing steamboats at St. Louis existed between John D. Daggett, Mary Thomas, Thos. T. Morse, Patrick Rogers, and Ann Eliza, wife of S. W. Hartshorn, whose trustee was Rowland Ellis, jr.; afterwards the partners agreed, in writing, that death should not work a destruction of the copartnership, but that the interest of any deceased partner should continue in his legal representative. In 1866 Thomas T. Morse died; his widow and administratrix, the defendant Sarah L. Morse, then, in writing, accepted and approved the partnership articles, and

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the business continued as before—Mrs. Morse representing her husband's interest and drawing the dividends. In 1870 Patrick Rogers died at his residence in Ohio. His son and executor, Robert C. Rogers, as directed by the will, took charge of his father's interest in the company, participated in its management, and drew dividends, till he died in June, 1873, the relations of the partners continuing unchanged till that date. In June, 1873, Daniel G. Taylor was appointed and qualified as administrator, with the will annexed, of the estate of Patrick Rogers here, and John D. Daggett, Mrs. Morse, and Mrs. Thomas executed a relinquishment of their right to administer upon the partnership estate, describing themselves as sole resident survivors of the copartnership known as the Sectional Dry Dock Company of St. Louis. Taylor thereupon took charge as administrator of the partnership estate, on July 8, 1873. In 1863 John D. Daggett became trustee of Mrs. Hartshorn, and was her trustee when the note sued on was executed.

The court, by its rulings, decided that these facts constituted defendants partners as alleged in the petition.

In December, 1870, a partnership was formed, under the name of T. P. Morse & Co., between John D. Dagget, a member of the Sectional Dock Company, Thomas P. Morse, son of defendant Sarah L. Morse, and Charles Drew, jr., secretary of the Sectional Dock Company. This firm operated saw-mills in Illinois, and had an office on the northwest corner of Third and Olive streets, St. Louis. They failed in the summer of 1873. It is claimed by defendants that Charles Drew, jr., without authority from the Sectional Dock Company, made and indorsed mercantile paper for the accommodation of the firm of T. P. Morse & Co., and that the note sued on is one of the notes thus indorsed by him without authority.

It appeared in evidence that the business of the Sectional Dock Company was, for a great many years, managed by a general agent of the partners. In 1867 Charles Drew, jr., occupied this position, and continued to do so until about

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two weeks before the maturity of the note sued on, when Taylor, as administrator, took entire control. The company had an office on Lesperance street, in the southern part of the city, where their books were kept and all their business was transacted. Drew also put up a sign of the company at the office of Morse & Co., corner of Third and Olive, a year or two before the maturity of this note, but it does not appear to have been, in any proper sense, the office of the company; and, two weeks before the maturity of this note, Taylor gave notice, in six daily papers of St. Louis, that he had sole charge of its affairs. He never used the office at the corner of Olive and Third, but at once removed the furniture to the regular office of the company, in the southern part of town; the signs, however, remained at the date of protest of the note.

As financial agent of the company, Drew was in the habit of indorsing and depositing, for collection and discounting, the business paper of the company; he kept its books, collected all bills, received and paid all moneys, kept bank accounts for it at two banks, and he alone could sign checks and indorse notes of the company. This he did, at first, as secretary, but for the last two years as "financial agent." The company received large amounts of notes for docking bills, and these were drawn in favor of the company, and were regularly indorsed by Drew as financial agent, and discounted by him, and the proceeds placed to the credit of the company.

The note sued on was made and indorsed for the accommodation of Morse & Co., and the proceeds were received by them alone.

The facts in regard to the purchase of the note sued on appear to be that, in December, 1872, Charles Drew, jr., put into the hands of Renick & Co., bill brokers, to get discounted, a note for $6,000, otherwise like the one in suit. This note was returned to Drew, with the suggestion that two notes for $3,000 each should be made in the place of it. Drew then pulled out a note, all signed as is the one in suit,

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and filled it up for $3,000, and also another one signed in blank by all the parties to the note before us, except Daggett, and delivered the first one to Renick, who went back to plaintiffs with it the same day and got the money, and Drew, at the same time, promised to have the other note signed by Daggett next day, and did, in accordance with his promise, give the second note to Renick, who got the money for it, on the next day, from plaintiffs. Plaintiffs saw no one but Renick about the matter, and they and Renick say that Renick told them that the dock company had a good deal of paper to carry for customers, and wanted money. Renick also says that Drew told him the same thing, but Morse, who was present at the time, contradicts him in this respect.

Plaintiff Whittaker says he knew the firm of Morse & Co., and also the Sectional Dock Company; that the latter was considered a very solvent company, and that their indorsement was good. He also knew that Daggett was at the time incumbering his real estate, and was in the market for money. He also knew that Daggett was a member of both companies.

There is no evidence that Drew had any authority from defendants to indorse any paper, except the regular business paper taken from the customers of the company and discounted in the regular course of its business; nor is there any evidence that the defendants had any knowledge, or any reason to suspect, that Drew was using the name of the company on the back of any paper except that received by the company in payment, and discounted in the regular course of its business.

At the maturity of the note, payment was demanded of Drew and of Thomas C. Morse, at the office of Morse & Co., Third and Olive streets, and notice of demand and non-payment given to him at the same place. No notice was sent to Daniel G. Taylor, nor to the office of the company, on Lesperance street. There was evidence that the notary who protested the note had express notice of the

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fact that Taylor had exclusive charge of the affairs of the Sectional Dock Company, some days before the maturity of the note, in a conversation with Taylor's book-keeper; but the notary had no recollection of any such information having been given him before the note matured, and says he did not know the fact at the time.

The evidence is voluminous. The court refused five instructions asked for plaintiffs, and gave twelve out of fifteen instructions asked for defendants. Six instructions asked for plaintiffs were refused. These instructions are very lengthy, and we do not think it necessary to set them out.

The plaintiffs complain that the court erroneously ruled as to the authority of the agent, and as to the right of plaintiffs to rely on the agent's representations; as to plaintiff's having notice of facts impeaching the validity of the indorsement, and as to the sufficiency of notice of dishonor.

We do not propose to pass upon all the questions thus presented. In our view of the case it will not be necessary.

If the note in suit was discounted or sold for the benefit and accommodation of Morse & Co. (as it unquestionably was); if Drew had no authority from the Sectional Dock Company to indorse its name on notes for the accommodation of Morse & Co. (and it nowhere appears that he had any such authority), then, if there were circumstances attending the making, indorsement, and sale of the note, known to the purchasers, or their agent, which should have put prudent men on inquiry as to Drew's authority to make such indorsement, the defendants, in our opinion, were not liable. *Hamilton* v. *Marks*, 52 Mo. 78.

The evidence shows that these circumstances existed, and were known to Renick, the agent of plaintiffs in the purchase of the note. The fact that the dock company was perfectly solvent, and had steamboat paper which they could use if they wanted to raise money, was known to Whittaker and to Renick; they knew that Daggett was

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incumbering his property, and was in the market for money. The names of the makers of the note were suggestive to persons acquainted with both firms that the paper was not for the dock company. Why should Daggett, embarrassed himself, be lending his name to the Sectional Dock Company, which was in excellent credit? The fact that the last indorser of the paper was Charles Drew, jr., was a strong indication that the paper was made for him, and the proceeds to go to his purposes. It is not pretended that his name could add any strength whatever to the paper. The law on this point was correctly declared by the court; and the evidence, on this view of the law, fully supported the finding for defendants.

The court below, by giving certain instructions asked for defendants, and refusing others asked for plaintiffs, in effect declared that service of notice of demand and non-payment by delivering it to Drew was not sufficient; that service at the office on Third and Olive streets was not sufficient; that service on Drew, at the office on Olive and Third, was bad; that service on Taylor was necessary; and that service on Drew, at the office on Third and Olive, was not service on the administrator.

It is not necessary, for purposes of this case, to decide that service on Taylor, the administrator, was necessary. We are of opinion that the court committed no error, under the evidence before it, in ruling service upon Drew, in the office on Olive street, to have been insufficient to hold defendants; and, as no other service is pretended, judgment must necessarily have been given for defendants on this ground alone. The office of the company was on Lesperance street; Drew had ceased to be its agent nearly three weeks before the maturity of the note, and Taylor had given public notice, for the same period of time, that he alone was authorized to attend to its affairs, and there was evidence that the notary had actual knowledge of these facts. Under these circumstances the court might very

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properly declare that notice at Third and Olive was notice to no one interested—neither to the administrator of Rogers, who had charge of the partnership estate, nor to any one of the surviving partners.

For these reasons we think the judgment of the circuit court should be affirmed, and it is so ordered. The other judges concur.

THE ST. CHARLES MANUFACTURING COMPANY, Plaintiff in Error, *v.* JAMES H. BRITTON, Defendant in Error.

May 16, 1876.

1. B. subscribed to the stock of a joint stock company, on condition that the capital stock should be $150,000; no calls to be made until $100,000 had been subscribed. *Held*, that he was liable to call when $100,000 had been subscribed, the company having organized under a certificate fixing the capital stock at $150,000.
2. One having, by mistake, signed an alphabetical list of subscribers to the company instead of the stock-subscription book of the company, who afterwards votes as a stockholder, is estopped to deny his subscription to the stock of the company.

ERROR to St. Louis Circuit Court.

Reversed and remanded.

M. McKeag and *B. Emmons, jr.*, for plaintiff in error, cited: Ham. & Deans. Plank Road Co. *v.* Rice, 7 Barb. 166; Rensselaer & Wash. Plank Road Co. *v.* Wetsel, 21 Barb. 64; A. & N. L. R. R. Co. *v.* Smith, 5 Ohio St. 328; Martin *v.* Zellerbach, 38 Cal. 300; Clinton *v.* H. Ins. Co. 45 N. Y. 454; Shaffner *v.* Jefferies, 18 Mo. 512; O. & L. R. R. Co. *v.* Veazie, 39 Me. 580; Fiser *v.* M. & T. R. R. Co. 32 Miss. 359; State *v.* M. & F. Assn., 3 Zab. 192; P. & S. Plank Road Co. *v.* Griffin, 21 Barb. 654; S. & S. Plank Road Co. *v.* Thatcher, 11 N. Y. (1 Kern.) 102; Ohio W. C. *v.* Love's Exr., 16 Ohio, 20; Brownlee *v.* O. & I. R. R. Co., 18 Ind. 68; Plank Road Co. *v.* Clemens, 16 Mo. 359; S. & T. R. R. Co. *v.* Tipton, 5 Ala. 807.

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G. S. Van Wagoner, for defendant in error, cited: O. & L. R. R. *v.* Veazie, 39 Me. 571; P. & S. R. R. *v.* Gazzam, 32 Pa. St. 340; Jenkins *v.* U. T. R. Co., 1 Caines' Cas. 86; Fiser *v.* M. & T. R. R., 32 Miss. 359.

Bakewell, J., delivered the opinion of the court.

Plaintiff filed a petition in which, after setting forth that it is a corporation duly organized as a joint stock company, under the name of "The St. Charles Manufacturing Company," for the purpose of manufacturing railroad cars, carriages, agricultural implements, and machinery, it alleges that, prior to the incorporation of plaintiff, and on January —, 1873, books were opened for subscription to the capital stock of said company, in which books the conditions of subscription were set out as follows:

"We, the undersigned, hereby subscribe to the capital stock of the 'St. Charles Manufacturing Company' the number of shares set opposite our respective names, at the rate of one hundred dollars per share, and hereby agree and bind ourselves to pay the calls upon said stock, as the same shall be made, from time to time, by order of the board of directors of said company. The purpose of said company is to manufacture railroad cars, other carriages, and agricultural machines and implements, within the city of St. Charles; and the subscription thereto is made upon the express conditions that the capital stock shall be at least one hundred and fifty thousand dollars, and that no calls upon the stock shall be made until the full amount of one hundred thousand dollars shall have been subscribed; that the whole amount of stock subscribed shall be paid up within one year from the first day of April, 1873, upon calls not exceeding ten per cent. per month."

That, in February, 1873, defendant was solicited to take stock in said company, and a subscription book, containing the obligations and conditions above set out, presented to him and read by him; that he then agreed to take ten shares of said stock, and for that purpose signed his name, with the number of shares he intended to take, and the amount,

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one thousand dollars; but, by mistake, subscribed his name in a book containing an alphabetical list of stockholders instead of the book containing the written obligation he intended to sign, by reason of all which it is alleged that defendant did then subscribe to ten shares of $100 each of said company, and bind himself to pay the same according to the conditions set forth in the book which defendant intended to sign.

That afterwards, in February, 1873, an election was held by those who had taken and subscribed stock in said company, for the purpose of organization, at which election an authorized agent of defendant voted his ten shares of stock, and thereby assisted at an election of directors of said company; that the directors then elected organized the company in accordance with the corporation law of the State, stating the amount of capital stock at $150,000, in shares of $100 each, and that defendant's name was placed on the books as subscriber and holder of ten shares of stock; that the board of directors made calls upon the stock of the company, ten calls of 10 per cent. each, from time to time, between March 22, 1873, and January 8, 1874; and that more than $100,000 had been subscribed on the books of the company before the first call; that defendant had full notice of each and all of these calls, and refuses to pay the same, though often requested.

Plaintiff, by reason of these allegations, asks judgment against defendant for $1,000, and interest on each installment from the date of each call.

To this petition defendant demurred on the ground that it does not set forth facts sufficient to constitute a cause of action, because—

1. It does not appear that the express conditions on which, according to the allegations of the petition, said alleged subscription was made have ever been complied with.

2. It does not appear from said petition that defendant ever signed any agreement to take any shares of stock.

The demurrer was sustained. Plaintiff refused to plead

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further. Judgment for defendant was entered on the demurrer. Exceptions having been properly saved, the case is brought to this court by writ of error.

It appears from the petition that defendant, if he ever subscribed to this stock at all, subscribed to it upon the express condition that the capital stock of the company should be at least $150,000; and also upon the condition that no calls upon the stock should be made until the full amount of $100,000 had been subscribed. A joint stock corporation is invariably empowered to raise a certain amount of capital by the mutual subscriptions of its members. In this State a manufacturing company, desiring to become incorporated, signs and acknowledges, before a proper officer, a certificate in which, amongst other things, is stated the amount of the capital stock, and it is then empowered to raise the amount of stock set forth in the certificate. The conditions of subscription in this case set forth the amount of capital stock of this company at at least $150,000; but they do not say that that amount will be at once subscribed, or will be subscribed before incorporation, or before any call is made upon the stock already subscribed. They do provide that no call shall be made until at least $100,000 has been subscribed; and the petition in this case alleges that over $100,000 was subscribed before any call was made upon the defendant. As soon as that amount was subscribed, he became, by the terms of subscription, liable for any call not exceeding 10 per cent. a month. It appears by the petition that the calls did not exceed this amount. It does, therefore, appear sufficiently, from the face of the petition, that all the conditions of the alleged subscription have been sufficiently complied with, and the demurrer on this ground ought not to have been sustained.

But it is said that it does not appear from the face of the petition that the defendant ever signed any agreement to take any shares of stock. It is alleged that, intending to sign the regular subscription books of the company, in

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which the conditions of subscription were fully set out, he signed, by mistake, a book containing merely an alphabetical list of subscribers to the company. Shall he be permitted now to say that he did not subscribe? The petitioner says he voted for directors in the meeting preliminary to organization and incorporation. He is then, under these circumstances, estopped to say he did not subscribe. A subscription to the stock of a company, in the name of a third person, without authority, is not binding on such person; but a letter of attorney constituting a proxy to vote at a meeting of the company is evidence of ratification (*McCully* v. *Pittsburgh R. Co.*, 32 Penn. 25.) And, if it be said that this meeting was before incorporation, we reply that a partner in an intended undertaking cannot repudiate the concern to which he has thus pledged himself, after he has been a party to such measures to carry out the same. A person subscribing before the organization of a proposed joint-stock company raises a mutuality on his contract which will render him liable to the company after incorporation. *Danbury R. R. Co.* v. *Wilson*, 22 Conn. 435. If defendant, intending to sign the agreement set forth in the petition, having read it over, had, by mistake, signed a blank sheet of paper, it would have been taken as an authorization and direction to write on the blank space the agreement he had intended to sign. He put down his name, intending to sign the conditions of subscription and to subscribe $1,000; he wrote that sum after his name, and he voted for directors of the company. He shall not now be heard to say that he did not subscribe.

These are the allegations of the petition, and they are admitted by the demurrer.

We therefore think that the Circuit Court erred in sustaining the demurrer, and the judgment of the Circuit Court sustaining the demurrer to plaintiff's petition is reversed and the cause remanded. Judge GANTT concurs. Judge LEWIS, having been of counsel, did not sit.

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THE STATE OF MISSOURI, use of GEORGE BINDBEUTEL, Respondent, *v.* HENRY N. NAUERT *et al.*, Appellants.

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June 6, 1876.

1. An intent to hinder, delay, or defraud creditors is sufficient to invalidate a mortgage. It is not necessary that there be also combination and confederation between the mortgagor and mortgagee.
2. It is error to instruct that, in order to render a mortgage void, there must have been an intent to "hinder, delay, *and* defraud creditors." The word "or" should be used, instead of "and." Such error is not cured by another instruction to the effect that an intent to "hinder and delay" will suffice.
3. Where part only of certain mortgaged property is taken in execution against the mortgagor, and the mortgagee gives notice of his claim, stating the value of all the property, whereupon the officer takes an indemnifying bond, reciting the value according to the notice, the obligors in the bond are not estopped by such recital, but may show that the property taken was of less value.
4. A constable having sold mortgaged property under execution, and paid the proceeds to the mortgagee, it was erroneous to exclude evidence of such payment, for the defense, in an action by the mortgagee for damages resulting from the seizure and sale.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Slayback & Haeussler, for appellants, cited: Lodge *v.* Laumel's Exr., 50 Mo. 204; State *v.* D'Oench, 31 Mo. 453; Reed *v.* Pelletier, 28 Mo. 173; State *v.* Tucker, 31 Mo. 445; Hopkins *v.* Sievert, 58 Mo. 201; Johnson *v.* Sullivan, 23 Mo. 414; Nury *v.* Merriman, 45 Mo. 500; Roustong *v.* Pacific R. R. Co., 45 Mo. 236; Young *v.* Kelly, 9 Mo. 50; Baker *v.* Stonebreaker, 36 Mo. 338.

Gottschalks, for respondent, cited: Wag. Stat. 1058, sec. 4; State *v.* Tasker, 31 Mo. 451; Meyers *v.* Chicago, Rock Island & Pacific R. R. Co., 59 Mo. 223; Prewitt *v.* Humes, 59 Mo. 325; Hayden *v.* Smith, 31 Mo. 569; Cason *v.* Murray, 15 Mo. 379; Burgert *v.* Borchert, 59 Mo. 80; Ensworth *v.* King, 50 Mo. 477.

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LEWIS, J., delivered the opinion of the court.

John Stamm executed a mortgage upon certain saloon fixtures and furniture, to secure payment of two promissory notes for $500 each, in favor of plaintiff's usee. Defendants Nauert and Kalb afterwards sued out an attachment against Stamm for a debt of $30, under which they caused to be seized and sold part of the same property. Plaintiff's usee made claim in accordance with the act of March 3, 1855, whereupon defendants gave the indemnifying bond, in the penal sum of $2,000, upon which this suit is founded. Plaintiff obtained judgment for $1,164.40.

The first instruction given for the plaintiff was as follows:

1. "The court instructs the jury that, to render the mortgage read in evidence void as to the creditors, the same must have been executed and received by virtue of a confederation and combination between Stamm and Bindbeutel for the purpose of hindering, delaying, and defrauding the creditors of said Stamm; and if the jury believe from the evidence that no such combination or confederation existed between said Bindbeutel and said Stamm, but that said Bindbeutel took said mortgage with the view only of securing his own claim against said Stamm, and had the same properly recorded in the recorder's office of St. Louis county before the levy of the constable, then said mortgage is good against the creditors of said Stamm, so far as the question of fraudulent intent is concerned, provided the jury believe from the evidence that the debts secured by said mortgage are *bona fide* and owing."

This instruction was fatally wrong. "Confederation and combination" were not required, under the law, to render the mortgage void as to creditors. Two parties may coincide in intent, and yet neither combine nor confederate. The intent to hinder, delay, or defraud creditors was all that the defendant had to establish in order to defeat the plaintiff's claim. *Burgert* v. *Borchert*, 59 Mo. 80. Another

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error, in itself conclusive against the instruction, appears in the use of the word "and" instead of "or" in the expression "hindering, delaying, and defrauding." The parties might have intended to hinder or delay Stamm's creditors, and yet not to defraud them. When the force of an instruction is controlled by a word different in meaning, as well as in form, from that used in the statute, the whole must fail before the statutory test. It is no answer to say that the instruction was "in direct response to the defendant's allegation that said mortgage was made for the purpose of hindering, delaying, *and* defrauding." The plaintiff's traverse of this allegation, using the same phraseology, simply contained a negative pregnant. That this was overlooked in the court below furnishes no excuse for reviving the effect of the vice in other parts of the record.

Respondent's counsel insist that "this instruction is a *verbatim* copy of one expressly approved by our Supreme Court," citing, *State, to use of Hayden*, v. *Smith*, 31 Mo. 569. The printed report of that case fails to sustain the assertion. The first instruction there given contains the expression "hinder and delay, *or* defraud," and the second, the words "hinder, defraud, *or* delay." Moreover, neither instruction is "expressly approved." The court merely finds them harmless, when taken in connection with certain other instructions given at the same time. The words "confederation and combination" appear, but no point was made on them. In *Burgert* v. *Borchert*, above cited, it was expressly decided that those words were inadmissible in that connection.

It is further contended, for respondent, that any objectionable features in the first instruction for plaintiff are corrected by some of those given for defendants. These last tell the jury, in effect, that they must find for the defendants if the mortgage was made with intent only to hinder and delay the creditors of Stamm. But if in one breath the jury are instructed that three things are requisite

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to a certain end, and, in the next, that two only will suffice, which rule must they obey? A contradiction between two instructions, so far from correcting the evils of either, multiplies them in both.

As this case must be tried again, it may be well to note one or two points not directly controlling the present reversal.

The testimony was somewhat conflicting as to the value of the property taken and sold under the attachment. It seems to have distinctly appeared, however, that this was only a part of the property covered by the mortgage and the mortgagee's notice of his claim. The notice stated the value of the property at $1,000, and the constable, following this, exacted a bond of the defendants in the penal sum of $2,000, repeating the valuation declared in the notice. It would be a great injustice to hold the defendants to this recital as an admission of the value of the property sold, especially if it be true that the recital covered more property than was so sold. And yet, taking all the testimony together, it seems impossible to escape the conclusion that the defendants were treated as estopped from denying that the property actually seized and sold was worth the sum mentioned in the bond. Three sworn appraisers fixed the valuation at $195, and the sales amounted to $209.15. Much testimony was given tending to show that a great deal of the property included in the mortgage was left undisturbed. It is true that an instruction limited the finding by the jury to the market value of the property when sold. But that availed nothing if the recital in the bond was taken as the defendants' admission, constituting conclusive evidence of that value. This point should be carefully guarded by a proper instruction.

The defendants offered to prove that certain proceeds of the constable's sales were paid over by him to the plaintiff's usee. It would seem that, in any aspect of the case, the damages recoverable should be reduced by that amount.

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Yet the court excluded the testimony for a reason which does not appear. If this exclusion was because of the fact appearing that Bindbeutel paid off (with the money so received or otherwise) the judgment in the attachment suit, there was a fallacy somewhere. Bindbeutel was Stamm's surety on the appeal bond. In that capacity he was liable to pay the amount of the judgment independently of any relation to the mortgage or the levy and sale. He was bound to pay it in any event; and the receipt of money from the constable, which aided him in doing so, was in diminution of his damages suffered by the sale as much as if it had been applied to any personal purpose of his own. We are unable to perceive upon what tenable ground the testimony was excluded.

We find no error in the refusal of instructions asked for by defendants. All the principles correctly presented thus were substantially embodied in instructions which were given at their instance. These, however, defendants' counsel have inadvertently omitted to mention in what is submitted, apparently, as a fair statement of the case.

The judgment is reversed and the cause remanded. All the judges concur. 2 299 104m437

LAFAYETTE SAVINGS BANK, Respondent, v. ST. LOUIS STONEWARE COMPANY, Appellant.

June 6, 1876.

1. The general powers of a manufacturing corporation give it no authority to indorse accommodation paper; but the fact that such a company appears as indorser of paper of which it is not payee does not tend to show that such an indorsement is for the accommodation of others, nor is it a circumstance to put those purchasing such paper on inquiry.

2. The burden to show that such paper was taken with notice that the company had no authority to indorse the same lies on the defendants, in a suit on the note.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

George Denison, for appellant, cited: McCullough *v.* Moss, 5 Denio, 566, 567; First Nat. Bank *v.* Hogan, 47 Mo. 472; Dabney *v.* Stevens, 46 How. Pr. 340, 341; Brown *v.* Donnell, 49 Mo. 421; Morford *v.* Farmers' Bank, 26 Barb. 568; Hall *v.* Auburn Turnpike Co., 27 Cal. 257; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Hamilton *v.* Marks, 52 Mo. 78; Farmers & Mechanics' Bank *v.* Empire Stone Dressing Co., 5 Bosw. 289; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23; Noble *v.* Walker, 32 Ala. 456; Mauldin *v.* Branch Bank, etc., 2 Ala. 502; Central Bank of Brooklyn *v.* Barnabas Hammett *et al.*, 50 N. Y. 158; Overton *v.* Hardin, 6 Coldw. 377; Stall *v.* Catskill Bank, 18 Wend. 478; Hendril *v.* Berkowitz, 37 Cal. 119; Richards *v.* Darst, 51 Ill. 140; Thomas *v.* Alton, 5 Mo. 534.

Ford Smith, for respondent, cited: Moss *v.* Averall, 10 N. Y. 449–453; McIntire *v.* Preston, 10 Ill. 48.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on a negotiable promissory note for $700, dated St. Louis, November 13, 1873, made by Merrick & Stickney, payable at plaintiff's bank, sixty days after date, to the order of Richmond, Bowman & Co., with interest at 10 per cent. after maturity. The note is indorsed "Richmond, Bowman & Co.;" "St. Louis Stoneware Company, E. T. Merrick, Treasurer."

The petition alleges the making of the note by Merrick & Stickney, copartners, and its delivery to the payees, who for value indorsed it in writing and delivered it to defendant, which, by its proper officer, indorsed in writing and delivered the same to the plaintiff for value; due demand, non-payment, protest, and notice are alleged, and that plaintiff holds the note for value, and that it is unpaid. The petition has the usual prayer for judgment.

Defendant, by its answer, verified by affidavit of its secre-

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tary, denies knowledge of the execution of the note, and that the payees delivered it to defendant; denies indorsement and delivery by defendant to plaintiff; says that defendant received no consideration for the note, and that plaintiff knew all these facts; denies knowledge of demand, protest, and notice; denies that it had knowledge of such facts, and puts the ownership of the note at issue. The answer charges that the note was made by Merrick & Stickney, and indorsed by Richmond, Bowman & Co. for the sole accommodation of Merrick & Stickney, in a matter outside the business of defendant's corporation; that Merrick & Stickney got it discounted for their own account by plaintiff, and that defendant had no interest in the note or its proceeds; says that plaintiff had notice of all these facts.

The reply denies the new matter in the answer.

On trial the suit was dismissed as to Richmond, Bowman & Co.

The plaintiff proved that defendant was incorporated on December 20, 1865, to carry on the stoneware and pottery business in St. Louis county, with a capital stock of $100,000; which stock, at the time the note sued on was made, was owned, as to nine-tenths, by Merrick & Stickney, and as to one-tenth by Lucien R. Blackmer, the secretary of the defendant; that Merrick was treasurer, and Stickney president of defendant, and that they acted as such at the time of the execution of the note, and many years prior thereto; that Merrick was generally known as financial manager of defendant, and that various notes made to the order of defendant, and indorsed by Merrick as its treasurer, had been, during a period of three years and up to the date of the notes, discounted in St. Louis by various banks; that Merrick & Stickney were copartners as brokers and dealers in land-warrants, and that the note sued on was signed by Merrick in the firm name, and that the indorsement of defendant's name was in Merrick's handwriting.

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Demand, notice, and protest were also proved, and, the note itself having been offered in evidence, plaintiff rested.

The court then, at the instance of defendant, gave an instruction that plaintiff, on the evidence, is not entitled to recover.

Plaintiff took a nonsuit with leave, and, a motion to set aside the nonsuit having been overruled, plaintiff appealed to general term, where the judgment of nonsuit was set aside and the cause remanded. The cause is brought here by appeal from the general term.

The defendant, the St. Louis Stoneware Company, has a general authority to make and indorse notes in the regular course of its affairs, and in prosecution of its business. Its general powers as a manufacturing corporation gave it no authority to indorse, for the accommodation of another, paper in which it was not interested. The answer of defendant says that the note sued on was accommodation paper. But this is affirmative matter of defense, and should have been proved to constitute any defense to this action. There is nothing appearing on the face of the note sued on to put plaintiff on inquiry. The note sued on was not, it is true, made to the order of defendant, but that did not tend to show that it was not received by it in payment, or as collateral, in the regular course of its affairs as manufacturer of stoneware and pottery. The evidence shows absolutely nothing, in the circumstances under which plaintiff took the note, to put it on inquiry. Merrick's possession of the note was not a circumstance to charge plaintiff with notice, since Merrick was the financial agent of defendant. It is true he was maker, or one of the makers, but he was also treasurer of defendant. The burden to show that Merrick, at the time of negotiation of the note, represented it to be for the benefit of the corporation, did not lie on plaintiff.

Plaintiff made out a complete *prima facie* case, and the

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instruction asked by defendant should not have been given. The judgment of the Circuit Court at general term, reversing the judgment of the Circuit Court at special term, is therefore affirmed, and the cause remanded to be proceeded with in accordance with this opinion. All the judges concur.

THE STATE, *ex rel.* B. W. ALEXANDER, Appellant, *v.* FRANK K. RYAN, Land Commissioner, Respondent. 9 303 34 568

June 6, 1876.

1. The St. Louis Land Commissioner, having allowed an appeal from his decision, refused to make and certify a transcript of the proceedings, without prepayment, by the party appealing, of the cost of making said transcript. *Held*, that *mandamus* was the proper remedy to compel his official action—Wagner's Statutes, page 849, section 10, which provides for rule and attachment against a justice of the peace refusing to allow an appeal, having no application to such a case.
2. When an appeal is taken from a decision of the land commissioner, it is his duty to make and certify, on demand, a transcript of his proceedings, without charge.
3. Respondent made return to an alternative writ of *mandamus;* the relator did not traverse or plead to the facts alleged in the return, but demurred; the return was declared insufficient in law, and the demurrer sustained. *Held*, that there was no foundation for an action for false return, and damages could not be assessed upon motion.

APPEAL from St. Louis Circuit Court.

Reversed, and peremptory mandamus *ordered.*

Blair & Huson and *J. H. Terry*, for appellant, cited: 2 Wag. Stat. 847, sec. 3; Carroll *v.* City of St. Louis, 12 Mo. 444; Beers *v.* Atlantic & Pacific R. R. Co., 55 Mo. 292; Palmer *et al.*, *v.* Kansas City & St. Jo. R. R. Co., 57 Mo. 249.

Leverett Bell, for respondent, cited: People *v.* Rockwell, 3 Ill. 3; People *v.* Hanlon, 29 Ill. 43; Watson *v.* Peyster, 1 Caines, 66; Johnson *v.* Brannan, 5 Johns. 268; Ripley *v.*

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Gifford, 11 Iowa, 367; State *v.* Daily, 45 Mo. 153; Wag. Stat. 811, sec. 15.

LEWIS, J., delivered the opinion of the court.

This is an application for *mandamus.* The petition shows that, in certain proceedings before the land commissioner, for the opening of California avenue, in the city of St. Louis, in which the relator was a party interested, the latter being dissatisfied with the judgment of the commissioner, and having in all respects complied with the requirements for taking an appeal to the Circuit Court, demanded of the commissioner a transcript of said proceedings, to be filed with the clerk of the Circuit Court, for the purposes of the appeal; that, although the relator duly tendered to the commissioner the fee for filing said transcript, the said commissioner refused, and still refuses, either to file said transcript or to furnish the same, so that it may be filed by the relator.

The respondent's answer to the alternative writ, after denying generally that any lawful cause for a *mandamus* is shown by the petition, states, in effect, that respondent is ready and willing to furnish said transcript whenever the relator shall pay to the city of St. Louis the reasonable cost of making it; that respondent is a salaried officer, not entitled to charge fees for any services; that he charges none in this instance; but it is unreasonable and unlawful for the city of St. Louis, at her own cost, to furnish a transcript to the relator, for his appeal, without being paid the actual expense incurred in preparing the same.

To this return the relator filed a demurrer, which the court overruled. The relator refusing to plead further, the peremptory writ was denied, and final judgment rendered for the respondent.

The law under which the appeal was taken is as follows: "Upon final judgment of the land commissioner, in every case in which exceptions are taken, an appeal may be taken to the Circuit Court of St. Louis county, within ten days

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after the rendition of the same, in the mode and manner, and with the requirements, so far as applicable, of an appeal from the judgment of a justice of the peace in the county of St. Louis," etc. Sess. Acts, 1875, p. 322, sec. 3.

For the purpose of showing that the relator, in applying for a *mandamus*, has mistaken his remedy, respondent refers us to the following provision in the law concerning justices of the peace (Wag. Stat. 849, sec. 10): "If the justice fail to allow an appeal in the cause, when the same ought to be allowed, such Circuit Court, or other court having jurisdiction of such appeal, on such fact satisfactorily appearing, may, by rule and attachment, compel the justice to allow the same and to return his proceedings in the suit, together with the papers required to be returned by him."

We do not think that this law was intended to apply to such a case as the present. The clerical act of making out a transcript is no part of the process of taking an appeal. It is performed only when the appeal has been already perfected. In the case before us it is not questioned that the appeal had been fully completed and granted by the commissioner when he refused to furnish the transcript. It will be apparent, upon an examination of the two statutory provisions above quoted, that such a state of facts is not literally within the terms of either. Not perceiving that their intendment is to any different effect, we are satisfied that *mandamus* was the relator's appropriate remedy.

No provision of law authorized the city of St. Louis to charge fees for the clerical labor required on this occasion. The duty of making out and filing the transcript in every case of perfected appeal is as emphatically laid upon the land commissioner as is any other pertaining to his office. He here admits that his salary is all the compensation required by himself for the performance of every duty; but he undertakes to speak in behalf of the city of St. Louis. The city, speaking for herself, through her ordinances or

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otherwise, has never made any such claim as is here preferred. She demands no return for the salary paid to the land commissioner, beyond the benefits derived by her citizens from his official services. The right of appeal from his decision is guaranteed by law. The same authority, in requiring an affidavit and bond, deems these sufficient to guard against a frivolous use of the privilege, or an unjust infliction of delays and expenses against the city. It may be, as suggested, that, in certain contingencies, a very large number of appeals will be invited by this interpretation of the law. But it is a true one, nevertheless. We are here to declare the law as it is. If it be unwisely framed, or inconvenient in operation, the remedy must be applied by another authority.

We are of opinion that the alternative writ and the return thereupon show a complete case for a peremptory *mandamus*, according to the prayer of the relator. The judgment of the Circuit Court is therefore reversed, and a peremptory *mandamus* will be issued from this court. Judge GANTT concurs; Judge BAKEWELL not sitting.

A motion to assess damages was filed and overruled, and, on a rehearing of this motion, LEWIS, J., delivered the opinion of the court.

The relator's motion for a rehearing of his motion to assess damages was sustained at our last term, and the latter was then continued, in order to furnish every possible facility for a full presentation of the grounds upon which the relator relies. We have now before us a carefully prepared brief, which appears to contain everything that can be said in support of the claim for damages in this proceeding.

Counsel again refer us to section 6 of the statute concerning *mandamus* (Wag. Stat. 925), which is as follows: "In case a verdict shall be found for the person suing such writ, or judgment given for him on demurrer, or by *nil dicit*, or for want of a replication or other pleading, he

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shall recover his damages and costs in such manner as he might have done in a civil action for a false return, and the same may be levied by execution, as in other cases."

Counsel here assume—

1. That the "damages" provided for are those which the relator has sustained by reason of the official malfeasance or omission which the *mandamus* was intended to remedy.

2. That the recovery of such damages, in the contingencies stated, is a positive right, which cannot be qualified or denied.

3. That the words "in such manner," etc., refer only to the forms or modes of procedure whereby the damages are to be recovered, and do not, in the least degree, qualify or limit the absolute right of recovery.

A short review of the history of the law will demonstrate that neither of these positions is tenable.

Our statute is, in this section and in nearly all the rest, a literal transcript from the statute 9 Anne, ch. 20. Prior to the adoption of that statute, the return upon the first, or alternative, writ of *mandamus* was not traversable. It was treated as a record, importing absolute verity. The trial proceeded, and judgment was rendered upon the facts *as stated in the return*, whether truly or otherwise. If the return was untrue in point of fact, the only relief for the party injured was in a subsequent action against the respondent for his *false return* upon the writ. The statute shortened the process by allowing a traverse of the return, and by allowing the traverser, upon proof of its falsity, to recover his damages, etc., "in such manner as he might have done in a *civil action* for a false return"— *i. e.*, for the false return already made in that case, and shown so to be. In a former opinion this court said: "The civil action for a false return, here referred to, is an action against the defendant for his false return upon the alternative *mandamus*. It does not mean, as counsel's argument seems to imply, any independent common-law proceeding for a false

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return, against a sheriff or other officer." Such, in fact, has been the uniform interpretation in England ever since the adoption of the statute, as well as in the States of the Union wherein the same statute has been enacted.

But, aside from historical adjuncts, our interpretation is the only one which can be reconciled with the other provisions of the Missouri statute. The 9th section, for example, provides that, "if any damages shall be recovered, by virtue of this chapter, against any person making return to such writ, he shall not be liable to be sued in any other action or suit *for making such return.*" If counsel's interpretation of the 6th section be correct, the more appropriate protection would be against "any other action or suit" for the original malfeasance or omission. Why provide against another suit for making the return, if the damages here recoverable are for a different cause of action?

The 4th section, supplementing the provisions for making up the issues, directs that "such further proceedings shall be had therein for the determination thereof, and in such manner, as might have been had if the person suing such writ had brought his *civil action for false return.*" Here, again, is an unmistakable provision for settling the rights of the parties as they would have been settled in the common-law action upon the return, in the absence of statutory permission to take issue thereupon instead.

Again, the 2d section provides: "When any writ of *mandamus* shall be issued, and return shall be made thereto, the person suing or prosecuting such writ shall *plead to or traverse* all or any of the material facts contained in such return." Here is no provision for a demurrer. It follows that all the benefits of the statute, including the summary recovery of damages, can apply only to an issue of *fact* raised upon the return. The relator may demur. But, if he does so, he is remitted to his own common-law position as to damages, etc., and can claim no privileges under the statute. This harmonizes with the unbroken course of

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English adjudications, in which it has been held that, if the return be found insufficient *in law*, no damages can be recovered in any form of proceeding. *Enfield* v. *Hills*, 2 Lev. 236–238; *Rex* v. *London*, 3 B. & Ad. 276, 279; *Rex* v. *London*, 5 B. & Ad. 233. Here it may be asked, what means the 6th section, where it provides for damages to the person suing the writ, if judgment be given for him "on demurrer, or by *nil dicit*, or for want of a replication or other pleading?" The answer is plain enough. By the 3d section it is provided that "the person *making such return* shall reply, take issue, or *demur* to the *pleading* of the party suing or prosecuting such writ." When we remember that all these provisions are literally copied from the statute of Anne, and that no common-law writer or law-maker ever confounded a "plea" or "pleading" with a demurrer—which implies, simply, a refusal to plead—it is easy enough to understand that the judgment upon demurrer referred to in the 6th section can be none other than a judgment on the respondent's demurrer to the relator's pleading; the judgment "by *nil dicit*, or for want of a replication or other pleading," will be, in like manner, a result of the respondent's failure to "reply, take issue, or demur," as required by the 3d section. In any one of these contingencies the relator's success will necessarily arise upon the issue of fact tendered by his traverse or plea to the return. It will never arise from the insufficiency in law of the return to the writ. This, again, is in harmony with the English rule already mentioned, that no damages could be recovered in the action for a false return unless the return had been adjudged and declared sufficient in law. The foregoing general principles have been uniformily recognized in English interpretations of the statute of Anne, and counsel do not show us why the same language, drafted into a Missouri statute, should be differently construed here.

The Massachusetts statute referred to by counsel, although differently framed, adheres to the same principles. After

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authorizing a traverse of the return (and also a demurrer), it provides that, "if the party suing the writ *maintains the issue* on his part, his damages shall be assessed," etc. Like our 9th section, but in more explicit terms, it then declares that "no action shall be maintained for a false return *to a writ of mandamus.*" This, again, helps us to perceive that, wherever, in these statutes, reference is made to the action for a false return, the law-maker is contemplating the return upon the alternative *mandamus*, and not a mere analogy with ordinary actions, for false return, against sheriffs, etc.

It should now sufficiently appear that the damages recoverable under the statute are not on account of the injury originally sustained by the person suing the writ, or any inconvenience directly resulting therefrom. Redress for such injury or inconvenience must be sought, if at all, in a separate action. It has been held, however, that the party injured by an official omission of a ministerial officer may have his choice between the suit for damages and the remedy by *mandamus;* but he cannot pursue both. *Kendall* v. *Stokes*, 3 How. 87. The relator here, it may be remarked, would have us permit him to pursue both remedies in the same proceeding.

It should also appear that the statutory expression, "in such manner," etc., means nothing more nor less than under the like conditions and limitations as would apply to a civil action for a false return upon the alternative writ, if there were no statute in the case. It follows that the relator, in this instance, is entitled to the assessment of damages demanded, if he could have recovered them in such an action, and not otherwise.

The relator demurred to the respondent's return. The decision of this court, in effect, sustained his demurrer. Thus the return was adjudged insufficient in law; and, for this reason, as well as because the facts alleged in the return were neither traversed nor pleaded to, there could have

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been no foundation for an action for false return. The relator is, therefore, not entitled to an assessment of damages.

The reasoning and authorities with reference to damages on an injunction bond have no application here. There, it is the defendant whose damages are assessed. He has not only been restrained in the exercise of a lawful right, but has also been forced into court against his will. The relator here comes into court voluntarily. True, he finds this necessary in order to enforce his rights. But the same may be said of every plaintiff in debt, covenant, or trespass. We have no precedent of an assessment of damages in any such case, because of the expenses or inconvenience of the suit. The motion is overruled. Judge HAYDEN concurs; Judge BAKEWELL not sitting.

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SARPY BERTHOLD *et al.*, Respondents, *v.* THE CLAY FIRE AND MARINE INSURANCE COMPANY, of Newport, Kentucky, Appellant.

June 6, 1876.

1. Where a cause of action is imperfectly stated in the petition, it will be presumed, after verdict, that all essential facts were proved.
2. If one having an interest in mortgaged property procure insurance in his own name, loss, if any, payable to the mortgagee, a suit may be maintained in the name of the mortgagee. Bringing the action is a ratification of the contract, and the mortgagee is entitled to recover the full amount of insurance, not to exceed the amount secured by the mortgage.

APPEAL from St. Louis Circuit Court.

Affirmed.

Melville Smith, for appellant.

E. P. Johnson, for respondents, cited: Webb *et al. v.* Morgan *et al.*, 14 Mo. 428; Harvey *v.* Dutcher, 15 Mo. 89; Miles *v.* Taylor, 19 Mo. 468; Meier *v.* Leiter, 21 Mo. 112;

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Dillon *v.* Bates, 39 Mo. 292; Nicholas *v.* Fritschle, 40 Mo. 67; Wag. Stat. 1000, sec. 3, 1068, sec. 35.

Bakewell, J., delivered the opinion of the court.

This was an action upon a policy of insurance for the sum of $2,400, and issued by defendant upon the property of one D. C. James, consisting of a portable saw-mill. The insurance is against loss by fire, for six months from January 25, 1874; loss, if any, payable to plaintiffs. The policy provides that the defendant should make good to the assured all such loss not exceeding the sum insured nor the interest of the assured in the property at the time of the loss; the amount of damage to be estimated at the actual cash value of the property at the time of the loss.

The petition set forth the copartnership of the plaintiffs, and that defendant, by the policy recited, did, in consideration of $180 paid by D. C. James, insure said James against loss or damage by fire, to the amount of $2,400, on the saw-mill described—loss, if any, payable to Berthold & Jennings, plaintiffs herein—by which defendant agreed to make good to said assured the interest of assured in the property; that the interest of said James exceeded $2,400; the proper proofs of loss were made; that the said sum had been demanded and refused, and was due, and prayed for judgment.

The answer denied all the allegations of the petition, and set up new matter of defense, which was totally abandoned on the trial.

Plaintiffs offered evidence tending to prove all the material allegations of the petition.

There was a verdict and judgment for plaintiffs for the sum of $2,145.54, and defendant, having filed a motion for a new trial, and a motion in arrest, which were overruled, brings the case here by appeal.

On the trial, DeWitt C. James having testified that he owned the property insured, defendant, on cross-examination, asked him what interest plaintiffs had in the property;

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to which he answered that they had loaned him money, and had taken a deed of trust on the property for about $3,000; that he had repaid them some of the debt; had a running account with them, and shipped them lumber; could not tell when he paid them the first payment. Defendant's counsel then asked: "How much did you pay them at the first payment?" and was answered: "I don't know how much." Defendant's counsel then asked: "About how much?" Plaintiffs' counsel objected, and the court sustained the objection. Defendant's counsel then offered to show the interest of plaintiffs in the property in question. The evidence was excluded by the court. To these rulings defendant's counsel excepted, and assigns them here for error. We see no error in the ruling; nor is any suggestion made that this action was erroneous in any other respect than this, that defendant, it is said, was thereby prevented from showing a material fact, to wit, the interest of the assured in the property. But, as the interest of the assured in the property was abundantly shown by testimony introduced by plaintiffs, and as defendant could not be benefited in any way by showing that plaintiffs had an insurable interest, we cannot see that defendant was prejudiced by the exclusion of this evidence.

Counsel for defendant asserts in his brief that he further "offered to show the interest of plaintiffs in the property, in order to show that it was in them, and not in the assured, which the court refused to permit." We are not referred to the page of the record containing any such offer, and have looked over the mass of matter contained in this carelessly written and almost illegible transcript to find the precise nature of this alleged offer, without success. It may have been omitted by the negligence of the copyist; for the clerical blunders in this transcript are such as to make sheer nonsense of a great part of it. It is, however, to be presumed that the interest of plaintiffs in this property was in them, and

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not in any one else; otherwise, it could hardly be called their interest. But counsel cannot expect the court to scrutinize a voluminous record for possible errors which they will not take the pains to indicate with some attempt at precision. It is no part of our duty to attempt to guess at the meaning which counsel may have intended to commit to paper whilst scrawling something which, by courtesy, is called a brief, but which counsel has not thought it worth his while to put into any coherent shape, or to have written out in a fairly legible hand.

The following instruction was given by the court, at the instance of plaintiffs:

"If the jury believe from the evidence that, on January 4, 1874, DeWitt C. James was the owner of a portable saw-mill, described in the petition, and situate in Wayne county, Missouri, and that defendant, by its policy of insurance of said date, insured the said James against loss or damage by fire on said mill, for a period of six months from said date; that said policy, or the loss thereunder, if any, was by the terms thereof made payable to Berthold & Jennings; that, while said policy was in force, said mill was damaged by fire; that said James gave due notice and made proof of said loss, as stated in the petition, they will find for plaintiffs, and assess damages at the amount they believe from the evidence the actual cash value of the damages so sustained on said mill, not exceeding the sum named in said policy, to wit, $2,400, to which they will add interest at the rate of 6 per cent. per annum, after a period of sixty days after service of notice and proof of loss as aforesaid."

The following instructions were asked by defendant, but whether they were given or refused we do not know; the record says nothing as to that:

"The jury are instructed that, in estimating the damages of the plaintiffs, if they find for them, they will ascertain

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the actual cash value of the property insured, at the time and place of the fire, and deduct therefrom the actual cash value of the property after the fire.

"The jury are instructed that, if they find for the plaintiffs, they will ascertain the actual cash market value of the (*sic*) of the property insured, at the time of the fire, and deduct therefrom the actual cash market value of the machinery or material which remained undestroyed after the fire.

"The jury are instructed that the policy covers only the Ames engine and boiler complete, and one Kingsland & Ferguson saw-mill complete, and did not cover the edge and extra carriage section subsequently purchased."

Appellant complains that the jury should have been instructed to find the actual cash value of the property at the time of the loss; that the instruction given for plaintiffs was bad, "because," in the language of counsel, "it failed to fix the time, and allowing the jury to consider the value at any time."

As we cannot tell whether the instructions asked by defendant were given or refused, and as, if refused, no exception is noted, it is entirely unnecessary for us to express any opinion as to the value of this suggestion.

Counsel also objects to the expression, "actual cash value of the damages," in plaintiffs' instruction, as being quite unintelligible. We think an ordinary jury would sufficiently understand what the expression meant, and would not be misled by it.

The motion in arrest was properly overruled, because, if the petition was defective, there was, at any rate, no defect which was not cured by verdict. Where a verdict could not have been rendered without proof of certain facts, the judgment will stand, though these facts be not sufficiently set out in the pleading. Where the plaintiff totally omits to state his cause of action, there is no room for presumption; but, where it is imperfectly stated, after verdict it

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will be presumed that all essential facts were proved, and the verdict will not be disturbed for defect in the petition.

This suit, in any case, was properly brought in the name of the person to whom the loss was payable, and for whose benefit the insurance was effected. And this would be true whether the insurance was effected by the mortgagor or mortgagee, and whether the mortgage was completely paid, partially paid, or entirely unpaid at the time of bringing suit.

If one having an interest in mortgaged property procure insurance in his own name, with a stipulation that the loss, if any, shall be paid to the mortgagee, a suit on the policy may be maintained in the name of the mortgagee. The bringing of such a suit ratifies the act of procuring insurance for his benefit. It is sound doctrine, applicable to simple contracts generally, and the appropriate and well-established doctrine of contracts of insurance, that, if one promise to another for the benefit of a third, the latter can maintain an action on the contract in his own name. 1 Chitty, 4, 5. Bringing the action is a ratification of the contract, and a mortgagee is entitled to recover the full amount of insurance, in case of loss, if such sum does not exceed the amount due, secured by the mortgage. *Motley* v. *Manufacturers' Ins. Co.*, 29 Me. 337.

It may be said that, if the mortgage was fully paid at the time of bringing suit, the plaintiffs should have sued as the trustees of an express trust. This point does not appear to have been at any time clearly made during the trial. We see no offer to show that the mortgage was paid before suit was brought, or that it was paid at the time of trial. Had such an offer been made, and rejected by the court below, it would be our duty to say whether or not such rejection was error of which defendant could complain. Had such proof been made, plaintiffs could have amended their petition to correspond with the facts shown, and the final result, as far as defendant is concerned, must have been the same.

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The fact of the payment or non-payment of the mortgage did not affect the right of plaintiffs to recover against defendant in this action; it went only to the question whether they should recover as trustees or in their own right. In either case the defendant must pay, and pay to them. And, as the mortgagor was a witness for plaintiffs in the case, defendant had no reason to apprehend that a recovery by plaintiffs would not be a complete bar to any claim against the company on the part of the assured.

On these principles we hold the pleadings and evidence quite sufficient to sustain the verdict, and that there was no error committed on the trial which is a ground to reverse the judgment. The judgment of the Circuit Court is affirmed. All the judges concur.

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PAUL A. KEANE, Appellant, *v.* BRIDGET M. KYNE, Respondent.

June 6, 1876.

1. It is error to compel a defendant to elect between two defenses, when both may be true. Such election can be compelled only when, if one defense be true, the other must necessarily be false.
2. The rule that a grantor in a fraudulent deed can have no relief against the effect of his own conveyance has no application to a conveyance made without any fraudulent design, and because of a misapprehension by the grantor concerning his legal rights.
3. Effect given by the Court of Appeals to preponderance of evidence in a chancery case.

APPEAL from St. Louis Circuit Court.

General term affirmed, special term reversed, and bill dismissed.

Jecko & Hospes and *Sam Erskine*, for appellant, cited: Henderson *v.* Henderson, Exr., 13 Mo. 151; Kelly *v.* John-

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son, 28 Mo. 251; 2 Washb. on Real Prop. (3d ed.) 447, and note; 4 Kent's Com. 305, and note; Willis on Tr. 55; Sugden on Vend. (9th Lond. ed.) 170; Belden *v.* Seymore, 8 Conn. 312; Philbrook *v.* Delano, 29 Me. 410; 2 Story's Eq., secs. 1199–1201; Leman *v.* Whitney, 4 Russ. 422; Squire *v.* Hardin, 1 Paige, 494; 1 Story's Eq., secs. 297–300, and note; Smith *v.* Bromley, Dougl. (Mich.) 695–697; Bump's Fr. Conv. 83; Curtis *v.* Perry, 6 Ves. jr. 746; Plattmore *v.* Staple, Coop. Eq. Pl. 250; Hill on Tr. 171, sec. 109; Rathburn *v.* Rathburn, 6 Barb. 78.

Marshall & Barclay, for respondent, cited: Morey *v.* Stanley, 54 Mo. 419; Hall *v.* Hoffman, 32 Mo. 519; Wag. Stat. 656, sec. 4, p. 1372, sec. 1; Poe *v.* Dornec, 54 Mo. 119; 1 Greenl. on Ev., sec. 40; Hill *v.* Bacon, 43 Ill. 477; Forrester *v.* Scoville, 51 Mo. 268; Dallam *v.* Renshaw, 26 Mo. 533; Kerr on Fraud, sec. 384; Bernecker *v.* Miller, 44 Mo. 102; Rumbolds *v.* Parr, 51 Mo. 592; Cravens *v.* Jamison, 59 Mo. 68; Story's Eq. Pl., secs. 241, 242; Orton *v.* Smith, 18 How. 263; Polk *v.* Pendleton, 31 Md. 118; Herrington *v.* Williams, 31 Texas, 448; Barron *v.* Robbins, 22 Mich. 35; Lake Road Co. *v.* Bedford, 3 Nev. 399; Harris *v.* Smith, 2 Dana, 11; Alton Ins. Co. *v.* Buckmaster, 13 Ill. 205; Schools *v.* Risley, 40 Mo. 356; Draper *v.* Shoot, 25 Mo. 197; Perry on Tr. (2d ed.), sec. 125 (class 5); 1 Lomax Dig., sec. 200 (class 3); Cloud *v.* Ivie, 28 Mo. 578; Perry on Tr. (2d ed.), sec. 124; Henderson *v.* Dickey, 50 Mo. 161; Jayne *v.* Boisgerard, 39 Miss. 796; Torrent *v.* Muskegon County, 22 Mich. 21; McAfee *v.* Lynch, 26 Miss. 257; Ross *v.* Young, 5 Sneed, 627; Huntingdon *v.* Allen, 44 Miss. 654; Matthews *v.* Leaman, 24 Ohio, 615; Johnson *v.* Hauston, 17 Mo. 58; Foster *v.* Reynolds, 38 Mo. 553; Smalley *v.* Hale, 37 Mo. 102; Nelson *v.* Broadack, 44 Mo. 596; Orton *v.* Smith, 18 How. 263.

Lewis, J., delivered the opinion of the court.

The petition states that, from the 9th day of April, 1863,

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plaintiff has been lawfully seized and possessed in fee simple of three certain lots in Kingsbury's addition to the city of St. Louis; that, only on the day before the filing of the petition, plaintiff was first informed that defendant pretended to have title to said lots by virtue of a deed purporting to have been executed by plaintiff and his wife to defendant, on February 10, 1873; that said deed is a forgery, and not the act or deed of plaintiff or his wife, and is a cloud upon plaintiff's title; wherefore plaintiff prays for the cancellation of said pretended deed, and for other appropriate relief.

The answer, after general denials, affirms the genuineness of the deed mentioned, and its sufficiency to convey the title of plaintiff to defendant. For a second defense it alleges that, on or about April 9, 1863, defendant's husband, Michael J. Kyne, since deceased, was owner of the real estate described in the petition, and, with defendant, his wife, executed a deed conveying the same to plaintiff; that this conveyance was without consideration, and was upon the express understanding and trust, then created and agreed upon by the parties, that plaintiff was to hold the naked legal title for the sole use and benefit of the said Kyne, and would reconvey to him, or to any other person, upon his request; that said conveyance was made, not to hinder, delay, or defraud any creditors or other persons interested in said estate, but only because the grantor was a person of pronounced sympathy for the cause of the armed rebellion then in progress against the government of the United States, and feared that the authorities of said government might undertake to confiscate his property on account of his said sympathy—the plaintiff being, at the same time, an obscure person, not likely to be molested on account of his political sentiments; that plaintiff never exercised any acts of ownership over said real estate; that the taxes were regularly paid by Kyne; that, on February

10, 1873, upon Kyne's request to that effect, plaintiff and his wife executed and delivered the deed conveying the property to defendant. Plaintiff replied, denying all the allegations in the answer antagonistic to his claim.

The Circuit Court, in special term, decreed for the plaintiff, declaring the deed of February 10, 1873, to be void, divesting all title to the land out of the defendant, and vesting the same in the plaintiff. This judgment was reversed in general term, whereupon plaintiff appealed.

In the course of the trial the court required the defendant to elect between her two defenses, ruling that she "could either deny the forgery only, or could admit the forgery, and amend so as to make the answer a cross-bill for relief, on the ground that Keane was a mere trustee for Mr Kyne in regard to the land in suit." This was error. There was no inconsistency between the two defenses. They might be equally true in point of fact. It is only when, if one defense be true, the other must necessarily be false, that a party may be required to elect upon which he will stand.

The defendant here refused to elect as required, whereupon the court refused to hear any testimony in support of the second defense. It is argued for the plaintiff that this action by the court was right, because it appears that the deed of Kyne to the plaintiff was voluntary, and made with a fraudulent intent. Authorities are cited to show that no relief against such a deed can be obtained by the grantor. But they fail of application to this case, for the reason that no fraudulent intent is here apparent. The Federal government could assert no claim to Kyne's land, by reason of his sympathy, of whatever description. His groundless apprehension, growing out of a misconception of his legal rights and of the fundamental principles of our beneficent form of government, might convict him of inexcusable ignorance. But this, although the country may have been at the time

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overrun with teachers of constitutional law, could hardly be set down as either a crime or a fraud.

The question, how far a voluntary conveyance, not affecting, directly or indirectly, the rights of any third parties, may be treated as raising a resulting trust in favor of the grantor, has never been clearly determined in Missouri. The English doctrine, as applied to common-law conveyances, holds that a man cannot be supposed to part with his property without some benefit to be derived from the act; and, as he gets no other consideration, the presumption arises that he is to enjoy the use of the land in the hands of his grantee. American statutes regulating conveyances of real estate, including the statute of frauds, have given rise to many nice distinctions, and some contrariety of views, upon questions similar to the one directly concerned here. By some courts a material point is made upon the presence or absence of a general warranty in the deed. The record in this case contains no copy of the deed of 1863, nor any precise information of its form or contents. It would, therefore, be impracticable, even if desirable, for us to pursue the analogies and develop the analysis which would be essential to a satisfactory solution of the inquiry. The demand for such an undertaking, however, is really superseded by the conclusion we reach upon another point in the case.

Proceeding to consider, as is proper in chancery cases, the force of the testimony adduced on either side, with reference to the execution of the deed from plaintiff to defendant, we find it impossible to concur in the relative estimates adopted by the Circuit Court. In proof that the deed was fairly executed and delivered, we have (1) the direct testimony of the defendant, given from her personal knowledge of the fact; (2) the certificate of acknowledgment, with the official seal of the notary public; (3) the testimony of experts, accompanied by unusually

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satisfactory elucidations, to the effect that the signature upon the deed must have been written by the hand which traced the plaintiff's autograph in the presence of the court. Against this we have (1) the testimony of several witnesses who show that, at the date of the deed, and for some weeks before and afterwards, the plaintiff's arm was so dislocated that he could not write; (2) the plaintiff's own denial that he ever executed the deed, together with a reiteration of his physical disability at the date appearing on its face.

If the plaintiff's denial be true, it could be quite as much so without the wounded arm. The great prominence given to this minor fact is little calculated to help the denial. Under the alleged circumstances of Kyne's conveyance, in 1863, he might well have thought it prudent to have a deed from Keane, duly signed, long before the time when the date was to be filled in and the acknowledgment taken. Considering how frequently deeds are actually signed on days more or less removed from their written dates, the grantor's inability to write on a particular day can have little weight against the notarial seal and certificate of his acknowledgment. This invites an examination of the more direct testimony on either side. The plaintiff's emphatic denial of his signature might have been quite effective but for the extraordinary statements by which it was accompanied. He said:

"In 1863 he (Kyne) deeded that land to me. My wife paid him some money for it. *So she informed me.* I don't know how much. Don't know whether it was $1,000, $500, or $300; think it was about $250. * * * I don't know where that deed is now. Mr. Kyne never gave it to me. The reason I never got it was I never asked him for it. I had no talk with Mr. Kyne, before the making of that deed of 1863, about buying that land. * * * I never sent John to pay the taxes before Mr. Kyne's death.

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Mr. Kyne paid all the taxes on that land up to his death. I never lived on the property; never had it inclosed; don't know whether Mrs. Kyne has had it inclosed. I never entered into any agreement with Mr. Kyne before that land was purchased. There was a payment made on the deed before it was made. It was made by my wife; not in my presence. He (Mr. Kyne) came and said he wanted money, and said he wanted to pay for that property, and I gave my wife some money, and she gave it to him. I don't know how long this was before the making of the deed of 1863. It might have been a year, and may be two years. She gave him about $250. I never took any receipt or memorandum of this money or payment. * * * I never asked him for the deed to that land made in 1863. I learned, after that deed was made, that payments on it had been made more than a year before. I know the payments were made, but we took no receipt. We had no talk previously with Mr. Kyne about buying that property. * * * Mr. Kyne paid the money for the taxes on that land from 1858 up to the time of his death. * * * I do recollect executing a security deed about that time, to that land, to Mr. Signaigo. It was a deed of trust for a thousand dollars. It was in 1869. I executed it at Mr. Kyne's request, and Mr. Kyne received the money and used it himself. I made no objections whatever to that. I never met Signaigo at all in that transaction. * * * I never got any of the money of the note; never asked Mr. Kyne for it. I never spoke to Mr. Kyne about that affair afterwards. I never tried to lease that land, or to sell it, or anything of that sort. * * * It was *both me and my wife* that managed the purchasing of that property."

Here is a *bona fide* purchaser of real estate for a valuable consideration, who is yet so indifferent about the details of his purchase, and the enjoyment of his property afterwards,

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as (1) not to know whether the price he paid was a certain sum, or four times as much, although presently confident it was the smaller amount; (2) to know only by hearsay that he ever paid anything at all; (3) to have never received, or even asked for, a deed or any receipt or memorandum of the money paid; (4) to have purchased without a word of previous negotiation, direct or indirect, with the vendor; (5) to be able to say, nevertheless, that "both me and my wife managed the purchase;" (6) to pay no taxes on the land during an ownership of ten years; (7) to execute and deliver, at the request of another, a deed of trust upon the property for four times the amount of his purchase money, and yet receive none of the money borrowed, and never hear anything afterwards of the transaction or its consequences; (8) to exercise no single act of ownership during the ten years, nor yet to know whether another person had done so at any time; (9) to ignore both property and title, with all their incidents, until after the death of the party to whom he is alleged to have made a reconveyance, and also of the notary before whom that conveyance appears to have been acknowledged.

These proofs of the plaintiff's indifference might go far to excite a suspicion that he was also unmindful of the circumstance of his having signed the deed in question. They at least fail, with reference to his direct testimony, of that conclusive corroboration which will sometimes turn the scale between the opposing statements of respectable witnesses.

The direct testimony upon the other side of the issue embarrasses us with no such strain upon an ordinary fund of credulity. It may be that the plaintiff, as he testifies, did never execute the deed to Mrs. Kyne which he here asks to have canceled, but the preponderance of the testimony to the contrary is, in our estimation, conclusive of the whole case. We therefore affirm the general term's

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reversal of the judgment at special term, and dismiss the plaintiff's bill. All the judges concur.

SILAS W. DOOLEY, Respondent, v. JOHN BARKER, Appellant.

June 6, 1876.

Where the trial of an issue of fact requires the examination of an account, it is error to refer it, against the objection of one of the parties, where the account is clearly not a long one.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Blakeman & Thayer, for appellant, cited: Edwardson *v.* Garnhart, 56 Mo. 81; Wag. Stat. 1041, sec. 18; Swift *v.* Wells, 2 How. Pr. 79; Miller *v.* Hooker, 2 How. Pr. 171; Stewart *v.* Elwele, 3 Code R. 139; McCullough *v.* Brodie, 11 How. Pr. 346; *s. c.*, 6 Denio, 659; Harris *v.* Mead, 16 Abb. U. S. 257; Dickinson *v.* Mitchell, 19 Abb. U. S. 286.

E. W. Pattison, for respondent, cited: Williams *v.* Allen, 45 Mo. 573; Whitswell *v.* Willard, 1 Metc. (Ky.) 216; Silmeer *v.* Redfield, 19 Wend. 21; McMaster *v.* Booth, 2 Code R. 111; Martin *v.* Hall, 26 Mo. 389; Robson *v.* Jones, 33 Tex. 324; Fitzgerald *v.* Hayward *et al.*, 50 Mo. 516; Martin *v.* Hall, 26 Mo. 386; Edwardson *v.* Garnhart, 56 Mo. 81; Sambler *v.* Mechanics' Fire Ins. Co., 1 Hall, 560; Bowman *v.* Sheldon, 1 Duer, 607.

BAKEWELL, J., delivered the opinion of the court.

This is an action brought by an attorney against his client, for professional services.

With the petition is filed a bill of particulars, dated May 1, 1874, and containing no other date, and embracing eight items, as follows:

To examination of title of Thomas' lands........	$ 30.00
To consultations as to ability to make judgment out of Thomas....................................	50.00
To injunction to prevent sale under Fitzgerald deed of trust....................................	50.00
To consultation and services as to sale of property held by Barker..............................	50.00
To making list of Thomas' property and incumbrances....................................	50.00
To filing attachment against Thomas, drawing papers, bond, etc....................................	50.00
To services in suit of Barker *v.* Thomas..........	50.00
To obtaining warrant against Thomas, securing his arrest, and conducting prosecution against him in Court of Criminal Correction..............	50.00
	$380.00
Credit by cash....................................	40.00
Balance due................................	$340.00

The answer denied that plaintiff has been employed to render the services charged for; denied the reasonableness of the charges, and said that, for all services rendered to defendant by plaintiff, he has been paid in full, save the sum of $25, which defendant admitted to be due.

Against the objection of appellant, the cause, on the application of respondent, was, when reached for trial in the Circuit Court, referred to a referee for a trial of all the issues. The referee reported a balance of $85 due to plaintiff. Exceptions were filed to the report of the referee, by the respondent, which were overruled, and the report confirmed and judgment entered for plaintiff; and, a motion for a new trial being overruled, the cause is brought before us by appeal.

The only point upon which appellant insists, before us, is

that it was error in the Circuit Court to refer the cause against his objection.

The statute authorizes the court (Wag. Stat. 1041, § 18) to direct a reference, where the parties do not consent, where the trial of an issue of fact shall require the examination of a long account on either side.

An account has been defined to be "a detailed statement of mutual demands in the matter of debit and credit between parties, arising out of contract or some fiduciary relation." The learned judge who delivers the opinion of the court in *McWilliams* v. *Allan*, 45 Mo. 574, accepts the definition as accurate. If so, the bill of particulars in this case is not an account at all, because the demands are not mutual. Barker has no demand against Dooley, and nothing appears in the bill of particulars to show that he ever had any demand against him. He paid $40 on account of his bill, and gets credit for it.

But, granting that that was an account in the strictest sense of the word, was it a *long* account?

In New York, under a like statutory provision, this question came up again and again; and there can be no doubt that an account such as this, consisting of eight items, which really seem to be only three items, at most, split up into unnecessary subdivisions, with one entry of a credit for money paid on account, would be held, in New York, not a proper subject for a reference, in the absence of consent. 16 Abb. Pr. 257. *Dickinson* v. *Mitchell*, 19 Abb. Pr. 286, was a case of attorney against client. The bill of particulars had five distinct charges on the debit side, and one item on the credit side. The Supreme Court, at general term, held this not an account, in the legal sense of the term, and that, if it were an account, it was not a long account, and that it was error to order a compulsory reference.

It seems doubtful whether the bill of particulars here can be called an "account" at all, within the meaning of the statute. It seems quite clear that, if an account, it was a very short one, and involved simply no calculations at all.

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We are told, however, that this is a matter purely within the discretion of the court below, and referred to *Fitzgerald* v. *Hayward*, 50 Mo. 517. The point decided there is that the court is not, in any case, bound to refer; which is quite different from saying that it can refer whenever it chooses. If the learned judge who delivered the opinion of the court says, as he does, "it is quite plain to my mind that the whole subject of reference is a matter of discretion," he must be understood as speaking with a view to the point before him. It is certain that it is not in the discretion of the Circuit Court to refer a case, against the objection of one of the parties, which does not come within one of the three classes named in the law. And the Supreme Court has expressly decided in *Martin* v. *Hall*, 26 Mo. 385, that, where the trial of an issue of fact does not require the examination of a long account, it is improper to refer it against the remonstrance of one of the parties. But the statute itself is so plain that there is no room for construction.

Neither is it in the discretion of the Circuit Court to declare that to be a long account which is manifestly a very short one. *Discretio est discernere per legem quid sit justum.* It is not purely arbitrary; and, even in matters of discretion, precedents are to be followed, as Coke says. 2 Inst. 298. The courts will not allow mere caprice to be dignified with the title of an exercise of judicial discretion. It is undoubtedly difficult to prescribe a rule which will cover all cases contemplated by the act, and to say what is a long account; but is impossible not to say of the alleged account before us that it is a short one. In *Martin* v. *Hall*, 26 Mo., already referred to, the Supreme Court refused to reverse the judgment, though it said that there was no necessity for referring the case, as it was susceptible of jury trial without too great inconvenience, and considered it doubtful whether the account was a long one. But that required measurements, calculations, and computation of mutual debits and credits, and under all the circum-

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stances, and, the judgment having been for the right party, the court refused to reverse on account of the order of reference.

We think that this was not a case contemplated by the statute, and could not legally be referred by the court, of its own motion. For this reason the judgment of the Circuit Court must be reversed and the cause remanded. The other judges concur.

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J. H. DOWELL *et al.*, Respondents, *v.* PHILIP C. TAYLOR *et al.*, Appellants.

June 6, 1876.

1. Where a lot of bagging in a warehouse was purchased, paid for, set apart to the purchaser, and marked with his name, the transfer of ownership was complete, notwithstanding a refusal by the vendor's clerk to allow a removal from the warehouse until the return of his absent employer—especially when it appears to have been a constant practice of the vendor to keep bagging on storage, for purchasers, after having sold it to them.
2. Under such circumstances a replevin suit by the purchaser is no evidence to disprove his possession and ownership, in favor of a seizure under replevin by a third party against the vendor. The purchaser's possession and ownership may be complete, as against a stranger, although a subject of controversy between him and his vendor.
3. The statutory bond in a replevin proceeding is no protection to the officer against the claims of persons having no interest in the controversy. The officer seizing the property of a stranger, and delivering it to the plaintiff, does so at his peril.
4. The plaintiff in a replevin suit is jointly liable with the officer for a trespass committed in executing the process.

APPEAL from St. Louis Circuit Court.

Affirmed.

M. B. Jonas, for appellants, cited: Coleman *v.* Roberts, 1 Mo. 68, 97; Lungstrass *v.* German Ins. Co., 48 Mo. 201; Nesbit *v.* Drew, 17 Ala. 379; Strong *et al. v.* Gregory, 19

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Ala. 146; Hamner, Admr., *v.* Smith, 22 Ala. 433; Stimpson *v.* Reynolds, 14 Barb. 506; Shipman *v.* Clark, 4 Denio, 446; Crocker on Sheriffs (2d ed.), ch. 43, pp. 382, 865; 1 Greenl. on Ev. (9th ed.), 247, 248, 171, 172, and authorities cited in note 1; 1 Wag. Stat., ch. 35, art. 2, p. 281, par. 10; Claflin *et al.* *v.* Rosenberg, 42 Mo. 439; Lesem *et al.* *v.* Hereford *et al.*, 44 Mo. 323; 1 Pars. on Con. 6; Wag. Stat. 1024, sec. 4; Andrews *v.* Lynch, 27 Mo. 167; Syme *v.* Steamboat Indiana, 28 Mo. 335; Ivory *v.* Carlin, 30 Mo. 143.

Farish & Griffin, for appellants.

Given Campbell, for respondents, cited: Bradley *v.* Holloway, 28 Mo. 150; The State *v.* Moore, 19 Mo. 369, and 21 Mo. 163; The State *v.* Shacklett, 37 Mo. 285; Commonwealth *v.* Stockton, 5 Mon. 193; Cammack *v.* Commonwealth, 5 Binn. 184; Stimpson *v.* Reynolds, 14 Barb. 508; Dameron *v.* Williams, 7 Mo. 141; Canfax *v.* Chapman, 7 Mo. 173; Perrin *v.* Claflin, 11 Mo. 15; Page *v.* Freeman, 17 Mo. 42; Allreed *v.* Bray, 41 Mo. 484; McManus *v.* Lee, 43 Mo. 206; Murphy *v.* Wilson, 44 Mo. 313.

Lewis, J., delivered the opinion of the court.

This is an action of trespass for the taking of 111 half-rolls of jute bagging, by defendant Taylor, as sheriff, and defendant Scherck, as plaintiff in a replevin proceeding against George R. Robinson & Co. Plaintiffs obtained judgment in the Circuit Court for $721.50, from which the defendants appealed.

It appears that, on November 5, 1874, plaintiffs purchased from Robinson & Co., and paid for at the time, 200 half-rolls of bagging, part of which they hauled away, so that, on November 11th, there remained in Robinson & Co.'s warehouse 111 half-rolls of the lot. On that day plaintiff Dowell, with his clerk, went to the warehouse, and with the consent and coöperation of the agent in charge, and the warehouse porter, under his direction, set apart 111 half-rolls as the remainder of plaintiffs' purchase, and marked

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them with tags bearing the plaintiffs' name. It was then declared that these were the plaintiffs' property, and that, if a loss by fire should occur, indemnity must be looked for under the plaintiffs' insurance policy. The agent, however, objected to plaintiffs' removing the bagging from the warehouse until after Mr. Robinson's return from a trip to Kentucky. This, he said, was in accordance with his instructions, and because he did not wish Mr. Robinson to find, on his return, so little left in store. On the same day, at a later hour, the defendant Scherck, holding a warehouse receipt of Robinson & Co. for 120 half-rolls of bagging not hitherto set apart or identified, and having instituted a replevin suit therefor against Robinson & Co., and given bond in due form, directed the sheriff, defendant Taylor, to seize the same lot which had been set apart to plaintiffs. The sheriff was about to do so when, upon the representations of Dowell and others, he became satisfied that the bagging was not then in the possession of Robinson & Co., against whom the order of delivery was directed, but was in the actual possession of Dowell & Co. He thereupon declined to execute the order. On the following day the plaintiffs, Dowell & Co., instituted a replevin suit against Robinson & Co., to obtain possession of their bagging, which was represented by their affidavit, in due form, to be in Robinson & Co.'s possession. The sheriff, finding in this affidavit a contradiction of the plaintiffs' previous representations, and a sufficient showing that the property was really held by Robinson & Co., considered it his duty to execute upon it the first order of delivery, being that in favor of defendant Scherck. He therefore seized the bagging, and delivered it to his co-defendant in this suit—plaintiffs, in the meantime, asserting their title, and protesting against the act in every form of notice which the occasion required.

The cause was tried before the court, sitting as a jury. Declarations of law, given for the plaintiffs, were to the

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general effect that if the plaintiffs had purchased the bagging, and had it set apart and delivered to them, and if, while it was in their possession, or in that of their bailees, the defendants deprived them of their said property, under a writ of replevin against Robinson & Co., the one acting as sheriff and the other as plaintiff in such writ, directing and assisting the execution thereof, and the defendants, upon plaintiffs' demand, refused to restore said property, then the plaintiffs were entitled to recover. Defendants asked for thirteen instructions, variously amplified, which were refused. That they were properly refused would result from an application of the reasoning which here follows:

1 Was there a complete delivery of the bagging to plaintiffs, so that they were invested with absolute ownership at the time of the seizure? Defendants insist that there was not, because the agent of Robinson & Co., when the rolls were set apart and marked, required that they should remain in the warehouse until Mr. Robinson's return to the city But the evidence clearly shows that this was by no means intended to qualify the transfer of ownership. It said, simply: "Here is the property which you have bought and paid for. It is yours, but will remain on storage, in your name, until the happening of a certain event." The acts of setting apart and marking were manifestly done to consummate the change of ownership. When this intent distinctly appears in such a proceeding, the law holds the delivery to be complete, and the title vested in the new owner. *Cunningham* v. *Ashbrook*, 20 Mo. 558. The evidence tended to show that it was the constant practice of Robinson & Co. to keep bagging on storage, for purchasers, for indefinite periods after their sales.

But the affidavit of plaintiffs, made on the day following this delivery, declared that the bagging was then in Robinson & Co.'s possession. So it might well be, although the ownership was complete in the plaintiffs. As to all

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strangers, the possession of Robinson & Co. was the possession of plaintiffs. But, as between themselves, there might still arise a controversy, for whose purposes, only, the possession by Robinson & Co. must be considered in its separate aspect. So in the case of landlord and tenant. The tenant's possession is the landlord's, in all controversies with third parties about titles. Yet it may be necessary for the landlord to aver the tenant's possession as a distinct fact, in order to recover the premises from him. There is no inconsistency here in the plaintiffs claiming, on the one hand, that their bailees were in possession of the property, and, on the other, that the plaintiffs were in possession by their bailees. It thus appears that the sheriff made a serious mistake in assuming that, because the plaintiffs declared, upon Robinson & Co.'s possession, for the purposes of their replevin suit, therefore they could not themselves have any possession as against the rest of the world, including the defendant Scherck.

But a far more important question than that of possession was really present for the sheriff's consideration. This was the question of ownership. Was it supposed that when A sues B in replevin, for a specific chattel, the officer may, with impunity, seize and deliver to A, in defiance of all claims and protests, the property of C, which may happen to be in B's keeping? If such were the law, no personal property would be secure against legalized robbery. The despoiler need only commence a replevin suit, in due form, against some third party having no title, in order to obtain a compulsory delivery to himself of his victim's goods. Our Supreme Court has repeatedly held that, in cases of seizure under *fieri facias*, notwithstanding the statutory forms provided for claims of third parties upon the property when wrongfully taken, the sheriff is liable in trespass to the true owner unless the forms of the statute be fully observed. *Bradley* v. *Holloway*, 28 Mo. 150. How much more clearly does that liability appear in replevin cases, where

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the officer's statutory protection operates against none but the parties in litigation? The provision is as follows: "After the due execution of any bond taken in virtue hereof, the parties to the action shall be barred of any right of action against the sheriff, or other officer, for the seizure and delivery of such property." Wag. Stat. 1027, sec. 20. The omission of any provision for protection of the officer against outside claimants leaves the law, in that connection, where it has always been. It would be a wonderful illustration of constitutional guaranties if our law should authorize its officers freely to deprive a man of his property in order to meet the exigencies of a controversy to which he is no party. Every writ in the hands of a sheriff must, so far as the rights of disinterested parties are concerned, be executed at his peril. A person may, by laches, or by estoppel, lose his remedy against an officer who conscientiously discharges his duty in ignorance of any wrong. But when, as in this case, the party injured has given due notice of his rights, and insisted to the last upon having them respected, there can be no shield for the wrong-doer because of his official character.

The liability of the officer as a trespasser being determined, that of his co-defendant, for whose benefit the trespass was committed, and who advised and directed it, necessarily follows. *Perrin* v. *Claflin*, 11 Mo. 15; *Canifax* v. *Chapman*, 7 Mo. 175; *Murphy* v. *Wilson*, 44 Mo. 313. Judge GANTT concurring, the judgment is affirmed; Judge BAKEWELL, of counsel below, not sitting.

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THE STATE OF MISSOURI, to use of ISAAC B. CLAYTON, Appellant, v. JACOB KURTZEBORN, Respondent. 2a 335 33a 482

June 6, 1876.

The execution debtor, if the head of a family, has a right to select what property he will hold exempt from execution, over and above apparel and household furniture to the value of $100; and if the property so selected is not valued on appraisement at over $300, it is the duty of the constable to release it. The constable cannot proceed to sell property so claimed until he has had it appraised.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Jno. P. Hudgens, for appellant, cited: Wag. Stat. 604, secs. 12–14; State to use v. Barada, 57 Mo. 562; State v. Romer, 44 Mo. 99; 21 Mo. 510, 160.

Wm. Kreiter, for respondent.

BAKEWELL, J., delivered the opinion of the court.

The petition alleges that defendant, as constable, had an execution for $40 and costs against Clayton, to whose use plaintiff sues, by virtue of which, on August 25, 1874, he seized and sold a horse, gig, and harness of Clayton's, who was then a practicing physician, and head of a family, residing in St. Louis county; that at the seizure he duly notified defendant that he claimed said property as exempt under the statutes, and that his entire property did not amount in value to the amount exempted by law from execution. He lays his damages at $300.

Defendant, in his answer, admits the levy and sale, and denies the other allegations of the petition above set forth, and says that he notified Clayton of his right to select what property should be held exempt; whereupon he elected to hold, and did hold, exempt from execution drugs and other personal property other than that described in the petition, and which exceeded in value the amount allowed by law,

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and that Clayton, at the time of the levy, had other property—two horses worth $300, household furniture worth $300, and a lot of drugs worth $500.

The reply denies the new matter in the answer. It appeared from the evidence that Clayton was a practicing physician and the head of a family, residing in the city of St. Louis; that he kept a small drug store, and that his stock of drugs, shelving, counters, mare, gig, harness, and books were levied upon, by defendant, on August 15, 1874. On the same day Clayton notified defendant, in writing, that, as a physician and head of a family, he claimed all the property levied upon as being worth less than $300, and exempt from execution; that the constable then released the other property, and retained the mare, gig, and harness; that, five days before the sale, Clayton notified the constable, in writing, that the horse was necessary to his business, and was his only horse, and that the horse and gig were worth less than $150, and that he claimed the same under the statute. The constable, however, proceeded to sell the horse, gig, and harness, under the execution, and sold them for $72. The evidence as to the value of the property seized was that of Clayton, who valued all his drugs, fixtures, and household goods, at the date of the levy, at less than $150, and the mare, gig, and harness at $150. Barback, the plaintiff in the execution, swore that the carpenter told him that the shelving and counters in the store cost $90, and, against the objection of Clayton, a witness was allowed to state that Clayton had told him that he had been offered $600 for his store, and had refused it.

The following instructions, asked by plaintiff, were refused by the court:

1. "If the plaintiff had other property at the time of the levy and sale, and claimed that sold, then it was the duty of the defendant to have levied on such other property, and released such as he claimed exempt, and if defendant sold

property claimed by plaintiff as exempt, and plaintiff was the head of a family at the time, then they will find for plaintiff."

2. "The jury are instructed that, if they believe from the evidence that plaintiff was the head of a family at the time of the seizure and sale of his property mentioned in the petition, and as such claimed the said horse, gig, and harness as exempt, and the same was sold by the defendant after such notice, then they will find for the plaintiff the value of such property sold."

3. "The jury are instructed that if plaintiff was the head of a family at the time of the seizure and sale by the constable, and gave notice before sale that he claimed the horse, gig, and harness as exempt, then they will find for plaintiff the value of the property. And it is immaterial whether he had other property or not. He had the right to select property of the value of $300, in lieu of other articles specified as exempt by law."

The court gave the following instruction of its own motion:

"Under the statute, the head of a family is entitled to hold exempt from execution $100 worth of household goods and furniture, for the convenience and comfort of his family, and $300 worth of other property, which he may select free of execution; and if the property of plaintiff did not exceed in value the amount of $400, then it was all exempt, if he was the head of a family at the time of the levy, and selected the property in dispute before the sale, provided the property so selected did not exceed the amount of $300."

The court refused to give the instruction without the proviso, and added that of its own motion. Exceptions were duly served.

The jury found for defendant, and plaintiff brings the case here by appeal.

Under the statute in this State, a head of a family is entitled to hold exempt from execution wearing apparel,

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beds, bedding, and household and kitchen furniture to the value of $100; and also such other property as he may select to the value of $300. It is made the duty of the officer to apprise the debtor of his right of selection, and to appraise the property so selected. If the appraisement does not reach $300 the property cannot be sold; but if the appraisement is $300, or more, the property may be offered for sale, and, if sold for more than $300, the excess shall be applied on the execution, and the remainder paid to the execution defendant.

In the case at bar it was the duty of the constable to appraise the property seized, if the claim exceeded the exemption in the opinion of the officer. Whether the property selected actually exceeded in value $300 was not a question in this case. The constable should not have been allowed to introduce any evidence of its value as matter of justification, in the absence of evidence of an appraisement. The execution debtor, and not the constable, has the right of selection. It matters not if the execution debtor was worth millions, he had a right to claim, as he did, the drugs, shelving, mare, gig, and harness levied upon. When he released the drugs and shelving, and the mare and gig were claimed, the constable was bound to release or appraise them. He is constituted, by the law, the guardian of the rights of the execution debtor in this matter; and he seems to have utterly disregarded his duties and committed a flagrant violation of the plain rights of the debtor and his family. Such conduct cannot be too severely reprobated.

It follows that the law of this case was not correctly given to the jury. Whether the whole property of Clayton was worth $400 or not, he was entitled to choose what he would hold exempt; and whether the property selected was worth $300 or not, he was entitled to have its value determined by appraisement; and, as the mare, gig, and harness were never appraised, and were sold for $72, it is quite clear that Clayton was entitled to a return of them when he

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made his application, and that the constable, in shameful ignorance of his most important duties, or by an act of deliberate and wanton oppression, has been guilty of a violation of his official duties, for which his sureties are liable.

The judgment of the Circuit Court is reversed and the cause remanded. All the judges concur.

LOUISA SCHMIDT, Respondent, v. CHARTER OAK LIFE INSURANCE COMPANY, Appellant. 2a 339 31a 69 2 339 53 102

June 6, 1876.

1. A life policy stipulated that if the assured should, without written permission from the company, visit or reside south of the thirty-sixth degree of north latitude, between the 1st day of June and the 1st day of November, the policy would become void. Under a permit for sixty days, the assured went to a point south of the thirty-sixth degree, remained there two years, and died there. During this period the quarterly premiums were paid to the local agent at St. Louis, who received them with full knowledge of the facts. *Held*, that the policy was not forfeited, and the beneficiary could recover. (GANTT, P. J., dissenting.)

2. A local agent of an insurance company, empowered to take risks and receive premiums, has a general authority to dispense with conditions in policies issued through his agency, in the absence of any limitation upon such authority, known to the other party. (GANTT, P. J., dissenting.)

APPEAL from St. Louis Circuit Court.

Affirmed.

S. Knox, for appellant, cited: Story on Ag., secs. 239, 243; Billings v. Morrison, 7 Cal. 171; Pittsburg R. R. Co. v. Gazzom, 32 Pa. St. 340; Bliss on Ins. 420, sec. 261, p. 464, sec. 296; Evans v. United States Life Ins. Co., 10 N. Y. 587; Bartholomew v. Merchants' Fire Ins. Co., 25 Iowa, 507; Plahts v. Merchants & Manufacturers' Ins. Co., 38 Mo. 248; Wall v. Home Fire Ins. Co., 36 N. Y. 157.

Hitchcock, Lubke & Player, for respondent, cited: Bevin v. Connecticut Mutual Life Ins. Co., 23 Conn. 254;

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Geib *v.* Ins. Co., 1 Dill. 449; Viele *v.* Germania Ins. Co., 26 Iowa, 9; Ins. Co. *v.* Wilkinson, 13 Wall. 223, 233; Baubie *v.* Ætna Ins. Co., 2 Dill. 158, 159; Thompson *v.* St. Louis Mutual Life Ins. Co., 52 Mo. 473; Bliss on Ins., sec. 307; Crawshaw *v.* Sumner, 56 Mo. 517; Chisholm *v.* National Capitol Life Ins. Co., 52 Mo. 217.

LEWIS, J., delivered the opinion of the court.

Plaintiff sued upon a policy of insurance issued by defendant, upon the life of her husband, Louis Schmidt, since deceased, for the sum of $1,000, and obtained judgment in the Circuit Court, from which defendant appealed. The policy contained a stipulation declaring that, "in case the said Louis Schmidt shall, without the consent of this company previously obtained in writing, pass beyond the settled limits of the United States, * * * or shall, without such previous consent, visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the 1st day of June and the 1st day of November, * * * then this policy shall be void, null, and of no effect." The policy was dated June 10, 1864, and the premiums were to be paid annually from that date, or quarterly on the 10th days of September, December, March, and June.

It appeared, from the testimony, that, on September 5, 1871, Schmidt obtained from Godfrey & Brother, the St. Louis agents of defendant, a written permit to visit and reside in Shreveport, Louisiana, which is situated south of the thirty-sixth parallel, for the term of sixty days thereafter; that he thereupon took up his permanent abode in Shreveport, and died there, of yellow fever, on September 18, 1873. No written consent, other than that already mentioned, was ever given by defendant, or its agents, for Schmidt's residence in territory requiring such consent by the terms of the policy. The defendant resisted plaintiff's demand on account of the alleged forfeiture thus created.

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The testimony further tended to show that all the premiums were regularly paid to the St. Louis agents, including that due on September 10, 1873; that the agent Block, to whom the last premiums were paid, was not authorized to give permits for changes of residence; but that he, and his predecessors, who were so authorized, had full knowlege, at all times, of Schmidt's residence in Shreveport, and received the premiums at each successive payment during the whole period, without objection or any claim of forfeiture.

Instructions—which need not to be here set out at length—were given or refused, by the Circuit Court, to the effect that the conduct of the agents, as above stated, if proved to the satisfaction of the jury, established a waiver, by defendant, of the condition requiring a written consent to Schmidt's continued change of residence. This proposition presents the ground upon which defendant here demands a reversal of the judgment.

The doctrine that either party to a written contract may waive, by parol, any of its conditions in his favor, is too well settled to need extended elucidation. In *Williams* v. *The Bank of the United States*, 2 Pet. 102, it is announced thus: "If a party to a contract, who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispenses with, or, by any act of his own, prevents the performance, the opposite party is excused from proving a strict compliance with the condition." That such a dispensation or waiver may be effected by parol, and yet constitute no violation of the rule which excludes parol testimony to vary the terms of a written contract, is also established by the highest authority. 1 Greenl. on Ev., secs. 302, 304. Because the condition, in the case before us, requires that the consent be written, it does not follow that the waiver must also be in writing. The stipulation for the written form of consent is in itself a condition, and may, in like manner, be dispensed with by the party entitled to demand it. It remains to be inquired what acts, if any,

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appearing in the testimony, have amounted to such a waiver of the condition in question as may entitle the plaintiff to recover, notwithstanding its breach. For this purpose any circumstances will be sufficient which prove that the defendant, while Schmidt continued to reside beyond the prescribed territorial boundaries, treats the contract as subsisting nevertheless, and not forfeited. If the policy had ceased to exist as a binding contract, the defendant had no right to collect any more premiums. Its receipt of the premiums, therefore, was a declaration to the other party that, so far as its option was concerned—and that was conclusive in the premises—the contract was still in force. The law of estoppel here interposes to preclude the defendant's afterwards asserting the contrary. The waiver of condition, then, if not declared in express terms, is equally effectual, from the fact that the defendant is estopped from denying it. Upon these principles it has been uniformly held that, where the non-payment of premium on a certain day would render a policy void by its terms, the receipt of the premium by the insurer, at a subsequent date, amounted to a waiver, and continued the policy in force. *Thompson* v. *St. Louis Mutual Life Ins. Co.*, 52 Mo. 469.

It is argued for defendant that, inasmuch as Schmidt's residence in Shreveport was an increase of the risk, the payment of an additional consideration, in the way of extra premium, was necessary to entitle the plaintiff to the benefit of the policy. We cannot see the force of this suggestion. The defendant might well have required extra compensation for its written consent to the change of residence, if demanded. But, as a waiver implies merely a voluntary adherence to what remains of the original contract, no consideration is necessary to support it.

It is further urged that a waiver by the St. Louis agents, whose authority was limited to the soliciting of applications for insurance and the collection of premiums, could not be binding for any purpose on the defendant.

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The agents were the only visible representatives of the defendants in St. Louis, where the policy was negotiated for and delivered. Under such circumstances, it is held that a party dealing with the agent has a right to presume a general authority in him, and is not to be affected by a specific limitation or exception to that authority unless this is brought to his knowledge. The general presumption is that what is known and acquiesced in by the agent is also known and assented to by the principal. The agents, in this case, knew of Schmidt's continued residence in Shreveport, and with that knowledge received the quarterly premiums as they accrued. It is presumable that these receipts were regularly transmitted to the defendant in Connecticut. If the defendant did not know the circumstances under which the payments were made, this resulted from dereliction of the agents appointed by itself, and was not the fault of the other party.

In *Wing* v. *Harvey*, 2 Big. Life Ins. Cas. 365, the life policy was subject to a condition making it void if the assured went beyond the limits of Europe, without license. The local agents, through whom the insurance had been effected, were informed that the assured resided, without license, in Canada, and they yet continued to receive the premiums. It was held that this precluded the company from insisting on the forfeiture. Said Lord Justice Turner: "The office undoubtedly received the money from their agents, to whom it had been paid upon express terms and conditions, and, the office having held out Mr. Lockwood and Mr. Thompson to the world as their agents for the purpose of receiving the premiums, I think it became the duty of Mr. Lockwood and Mr. Thompson, and not that of the plaintiff, to communicate to the head office at Norwich the circumstances under which these premiums had been paid to and received by them, and the representations which were made on the occasions of such payments and receipts. Upon these grounds my opinion is that these policies must

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be considered to have been continuing policies, and that this claim must, therefore, be allowed."

In *Buckbee* v. *United States Insurance and Trust Company*, 18 Barb. 541, it was held that the renewal of a life policy (which had expired by non-payment of premium) in favor of one who at the time was sick, and so known to the officer renewing the policy, was a waiver of conditions against ill-health of the assured, which otherwise would have avoided the policy.

In *Peoria Fire and Marine Insurance Company* v. *Hall*, 12 Mich. 213, a suit on a fire policy, the knowledge of the agent, when the policy was issued, that gunpowder was kept on the premises insured, was held to be a waiver of a condition prohibiting the keeping of it without written permission. In the case of *Viele* v. *Germania Insurance Company*, 26 Iowa, 9, the principles here involved are ably and exhaustively discussed in their application to both fire and life policies. It is there held that "any acts, declarations, or course of dealing by the insurer, with knowledge of the facts constituting a breach of a condition in the policy, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, will amount to a waiver of the forfeiture by reason of such breach, and estop the company from setting up the same as a defense, when sued for a subsequent loss." It is further held that such a waiver need not be in writing, and need not be founded on any new consideration. As to the power of a local agent of a foreign insurance company, clothed with the customary authority given to such agents, touching policies issued at their agencies, it is held that he has power to dispense with conditions and waive forfeitures arising from a breach thereof, in the absence of any limitation upon his authority known to the assured; that such powers are "necessary incidents of the general authority of the agent to effect contracts of insurance, conduct the business at his agency, and do all things necessary and proper in the prosecution

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thereof." The opinion refers to a very large number of adjudications upon the subject, and adds: "It is not to be disguised that, upon this question, there is very great conflict of authorities, some cases restricting the power of the agents to the most narrow limits of the express terms of their appointments, and circumscribing it strictly by the restrictions imposed by the principals, the insurance companies. But the more recent cases support the contrary view, and are in consonance with the doctrines we have attempted to maintain in this opinion."

We conclude, after careful examination, that the weight of authority, English and American, is largely on the side of the opinion just referred to. We therefore do not find any error in the rulings of the Circuit Court in the present case. The judgment, then, must be affirmed; Judge BAKEWELL concurring. Judge GANTT dissents.

GEORGE FALES, Appellant, v. GILES F. FILLEY, Respondent.

June 6, 1876.

Where a bond was delivered to A, signed by B, and not to be negotiated until also signed by A, and the fact that A's signature was essential to complete the instrument appeared on the face of the paper itself, a purchaser for value is held to be affected with notice of the agreement between A and B, and cannot recover in an action against B, if the bond is not also signed by A.

APPEAL from St. Louis Circuit Court.

Affirmed.

Cline, Jamison & Day, for appellant, cited: Clamorgan v. Greene, 32 Mo. 285; Dickson v. Anderson, 9 Mo. 156; Lajoye v. Primm, 3 Mo. 530, 368; Durella v. Briggs, 47 Mo. 356; Joeckel v. Easton, 11 Mo. 118; St. Johns v. Roberts, 31 N. Y. 441; Big. on Estop. 459, 460.

Glover & Shepley and *Johnson & Wilson*, for respondent.

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cited: Ayers *v.* Milroy, 53 Mo. 516; Mayors *v.* McMilly, 7 Heisk. 294; Flagg *v.* Palmyra, 33 Mo. 440; Henderson *v.* Bondurant, 39 Mo. 369, 374; Lovett *v.* Adams, 3 Wend. 380; Mercer County *v.* Hasket, 1 Wall. 92; Merriam *v.* Rockwood, 47 N. H. 81; Gaalor *v.* Matthews, 5 La. An. 496; McComas *v.* Greene, 6 La. An. 121; Pelcher *v.* Kerr, 7 La. An. 144.

BAKEWELL, J., delivered the opinion of the court.

It appears from the pleadings and evidence in this case that, on August 1, 1868, Giles F. Filley, the respondent, was liable, as accommodation indorser, to the amount of $800,000, on the paper of John How. To obtain an extension of time, How and Filley proposed to execute 250 bonds, of $1,000 each, all bearing interest at 9 per cent., with coupons, payable every six months, all payable at the National Bank of Commerce, New York, all dated August 1, 1868, and secured by 250 shares of Excelsior Manufacturing Company stock, owned by respondent, Filley, and assigned to trustees, with the power to sell on the non-payment of two or more bonds. These bonds were also guaranteed by Oliver D. Filley, and were payable, twenty-five on August 1, 1870; twenty-five on February 1, 1871, and so on, at half-yearly intervals, the last twenty-five maturing on February 1, 1875. These bonds were all sold, and the proceeds were applied to the payment of the indebtedness of How, for which the respondent, Filley, was liable. Of these bonds, eighty-four were sold in Philadelphia, by Robert K. Woods, thirteen of which were purchased of Woods by plaintiff. At the time of the sale, Woods represented himself as the agent of How and Filley for the sale of the bonds. There is evidence that he was the agent of How. There is no evidence that he was the agent of Filley. This suit is upon bond No. 114, of the series, being one of the thirteen bonds purchased by plaintiff of Woods. It is signed by respondent, but, by accident, How neglected to sign it. It purports, by its recitals, to be the bond of How and Filley. The coupons, for interest upon it, were all regu-

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larly paid at maturity. But, when the bond matured, it was first discovered that How had never signed it, and respondent denied any liability upon the bond, declaring, as he declares in his answer, and as he proved on the trial, that the bond was signed by him and delivered to How upon the condition that it should not be negotiated until How had also signed it. Hence this action. The bond shows the name, "Giles F. Filley," opposite the last seal. No name is written opposite the other seal. The initials "J. H." are on the revenue stamp, but were not put there by John How, nor by his direction. It appears from the guaranty upon the back of the bond, signed by O. D. Filley, that John How and Giles F. Filley were both to execute the bond. When plaintiff purchased, he supposed the bond was signed by John How. It further appears in evidence that, at the date of the execution of these bonds, John How executed to respondent, Filley, a bond, in which he acknowledges the execution of the 250 bonds, including the one in suit, to save defendant harmless on account of these bonds.

There is no controversy whatever about the facts, except that plaintiff's counsel claim that Woods was the agent of How and Filley for the sale of the bond sued on. But in this they are wrong, for there is no evidence that Woods was the agent of Filley for this purpose. His statement to this effect, however honestly though mistakenly made, could not bind Filley. No exceptions were saved, on the trial, to the exclusion or admission of evidence.

Defendant asked two instructions, which were given. Plaintiff asked seven instructions, which were all refused. It is not necessary, for the purposes of this opinion, to set out these instructions. Those for defendant were to the effect that, if the bond sued on was signed by Filley, for the accommodation of How, and was delivered by Filley to How, on condition that it was not to be Filley's bond till signed by How, and was not to be used till so signed, and

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if How did not sign it, but transferred it, and the instrument shows on its face that the parties to it intended that How should sign, plaintiff cannot recover; and, also, that, if respondent paid any coupon of the bond, without notice that How had not signed, such payment does not affect the question of Filley's liability on the bond. The instructions for plaintiff, as to some of them, set forth the material facts in evidence, and declare that, on these facts, plaintiff is entitled to recover. Some of the instructions asked for plaintiff assume, however, that Woods was agent of Filley; those that so assume are not supported by the evidence, and were correctly refused on that ground alone. If, however, the instructions given for defendant were correct, they fully covered the law applicable to the facts, and the question of the abstract correctness, as declarations of law, of any of the instructions refused becomes wholly immaterial.

There was a verdict and judgment for defendant, and, after the motion for a new trial had been overruled, all exceptions having been duly saved, the cause is brought here by appeal.

We are of opinion that no error to the prejudice of plaintiff's rights was committed by the Circuit Court in the trial of this cause, and that, upon the evidence, the plaintiff was not entitled to recover.

The bonds having been delivered to How, signed by Filley, and not to be negotiated until signed by How, and the fact that How's signature was essential to complete the instrument appearing upon the face of the paper itself, would, under ordinary circumstances, be fatal to a recovery by plaintiff, and this even if the bond-holder had no notice of the agreement between respondent and How. *Ayres v. Milroy*, 53 Mo. 516.

But is a liability on the part of defendant established by the fact that the proceeds of this bond went to pay an existing indebtedness of How for which respondent was liable? Why should this be? Filley promised to pay on certain

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conditions, which were never fulfilled. That these conditions were never fulfilled is the misfortune of the purchaser of the bond, but not at all the fault of Filley. If, as is probable, the bond was bought on the faith of Filley's name, the purchaser should have been careful to see that Filley's name was there in such a way as to bind him. Of course, neither the plaintiff nor any prudent man would have touched the bond if the absence of How's signature had been remarked. Suppose that, instead of issuing bonds, How and Filley had paid How's paper by issuing new notes, made by How, indorsed by Filley; that these new notes had been sold, and the proceeds applied to the extinguishment of the old debt on which Filley was liable; will it be maintained that if, as to any one of the new series of notes, no steps had been taken to pay his liability as indorser, at the maturity of the paper, Filley would have been legally, or even morally, bound to pay such note, because the proceeds of it had been applied to extinguish the old debt in which Filley was formerly liable? Yet it seems that the cases are parallel. In the case supposed, Filley says, If How does not pay, and I have due notice, I will pay the note; in the case at bar he says, If How sign this bond, I will become jointly and severally liable with him upon it. The fact that the proceeds go to pay an existing liability of Filley for How appear in neither case, and in neither case do we think that it can be taken to create a liability on the part of the person making this conditional promise, where the condition precedent has not been fulfilled.

It is said that the execution of the indemnifying bond by John How estops him to deny the execution of the bond sued on in a suit by defendant against him for the amount. Grant it. It by no means follows that, because Filley could obtain judgment against How, plaintiff is entitled to judgment against Filley. The payee and accommodation indorser of a promissory note could recover against the

maker, if he chose to pay the holder and take up the note after he was released as indorser for want of notice; but he is not bound to pay, for all that. His answer is, I made no such bargain; *non hæc in fœdera veni.* And it is the answer of respondent in this suit, and we think it a conclusive one.

It is the laches of plaintiff that he bought this bond without any examination of the instrument. It turns out that How did not sign it. Filley agreed to pay it only on condition that How should sign, and that condition has not been fulfilled. Filley has made no false representation which has led plaintiff into this misfortune, and he is not responsible for it. It might have been that Mr. Woods had, by accident, delivered a blank paper by mistake, and that bond No. 114 was never printed, filled up, or signed at all. Filley's position would have been precisely what it now is. As the matter stands, plaintiff has recourse against How, as we are told Filley would have if he should be compelled to pay this bond.

The law presumes that plaintiff read this bond when he bought it, and affects him with the knowledge of all that appears upon its face. He is as fully affected with notice of the agreement between How and Filley, that the bond should not be sold until How had signed, as if he had heard every word that passed between them. On any theory, he knew enough to put him on his guard and to make further inquiry a duty, and if he neglected to read the bond, or, having read, cared nothing about the completeness of the instrument, the loss, if any, must now fall on him.

The judgment of the Circuit Court is affirmed. All the judges concur.

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A. J. BRUNSWIG *et al.*, Respondents, *v.* PHILIP C. TAYLOR *et al.*, Appellants. 2 351 / 42 520

June 6, 1876.

A commission merchant occupies a fiduciary relation to his principal, so that a discharge in bankruptcy will not, under section 33 of the United States bankruptcy act of 1867, release him from liability upon a debt so incurred.

APPEAL from St. Louis Circuit Court.

Affirmed.

Farish & Griffin, for appellants, cited: Cronan *v.* Cotting, 104 Mass. 245; Lemcke *v.* Booth, 47 Mo. 385; Chapman *v.* Forsyth, 2 How. 202.

Slayback & Haeussler, for respondents, cited: Stokes *v.* Mason, 10 R. I. 261; Bump. (7th ed.) 638; *In re* Patterson, 1 Bank Reg. 58; 2 Ben. 155; *In re* J. R. Pettes, 2 Bank Reg. 155; *In re* Seymour, 1 Bank Reg. 7; *In re* Kimbal, 6 Blatchf. 292; *In re* Robinson, 6 Blatchf. 253; Whittaker *v.* Chapman, 4 Am. Law Times, 92; Warner *v.* Crankhite, 2 C. L. J. 773; Lemcke *v.* Booth, 47 Mo. 385.

LEWIS, J., delivered the opinion of the court.

Defendants were commission merchants in the city of St. Louis. Plaintiffs, residing in Kansas, shipped to them, for sale on commission, in the ordinary course of trade, a lot of produce, which was received by defendants, and sold, early in June, 1873. Afterwards, on June 14th, defendants suspended payment, and, on the same day, transmitted their account of sales to plaintiffs. In July, 1873, defendants were adjudicated bankrupts, and, in December, 1874, obtained their discharge. Against this suit for the proceeds of sales defendants pleaded, in vain, their discharge in bankruptcy.

The question presented by the record is whether a commission merchant stands in a fiduciary relation to his principal, within the meaning of section 33 of the United States bankruptcy act of 1867, so that a discharge will not release

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him from liability upon a debt incurred in that capacity. The weight of reasoning upon decisions rendered elsewhere, under the bankrupt acts of 1841 and 1867, may be conceded to the defendants. But, in Missouri, the question is no longer open. In *Lemcke* v. *Booth*, 47 Mo. 385, our Supreme Court, after reviewing and comparing some of the decisions referred to, concludes that "an indebted factor or commission merchant stands in a fiduciary relation to his principals, with respect to the proceeds of sales of commission goods in his charge, and debts incurred in that capacity are not discharged" under the act of 1867.

Defendants undertake to break the force of this decision, with the fact that defendants, in the present case, guaranteed the proceeds of their sales, and were bound to pay them over, whether collected or not. But we cannot see how that enables us to evade the ruling of the Supreme Court. The trust was the same, with or without the guaranty. Moreover, the principle involved in that argument was, in another form, pressed upon the attention of the court in the case referred to.

Upon the authority quoted we are constrained to affirm the judgment. Judge GANTT concurs; Judge BAKEWELL, of counsel in the court below, not sitting.

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EUGENE G. SWEENEY, Plaintiff in Error, *v.* JULES VAUDRY *et al.*, Defendants in Error.

June 6, 1876.

1. **A submission to a majority of five arbitrators will support an award by four, where only four heard the case, when both parties were present at the hearings, and no objection was made until after the award. Such an award can be enforced by motion under our statute.**
2. **Where the parties had rested their case, and the arbitrators, on notice to both sides, reopened the matter for further testimony, this will not invalidate the award.**

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3. Where the arbitrators were under the submission to comply with the by-laws of a certain association, and violated these by-laws in not entering in a proper book a summary of the controversy and the grounds of their award, *held*, that such neglect did not invalidate the proceedings.

ERROR to St. Louis Circuit Court.

Reversed, and judgment rendered.

Marshall & Barclay, for plaintiff in error, cited: Wag. Stat. 143, secs. 1, 6; Bridgman v. Bridgman, 23 Mo. 272; Tucker v. Allen, 47 Mo. 488; Howard v. Saxton, 1 Denio, 440; Graham v. Graham, 9 Pa. St. 254; French v. New, 20 Barb. 481; Woods v. Page, 37 Vt. 252; White v. Robinson, 60 Ill. 499; McShaw v. Gray, 13 Iowa, 504; Akridge v. Patillo, 44 Ga. 585; Blanchard v. Murray, 15 Vt. 548; Bemus v. Clark, 29 Pa. St. 251; Norton v. Savage, 10 Mo. 455; Knowlton v. Homer, 30 Mo. 552; Shisler v. Keavy, 75 Pa. St. 79; Cutler v. Whittemore, 10 Mass. 442; Taylor v. Zepp, 14 Mo. 482; Rutherford v. Tracey, 48 Mo. 325; Morse on Arbitration, 117; Broom's Leg. Max. 129; Woodrow v. O'Conner, 28 Vt. 776; Hill v. Taylor, 15 Wis. 190; Bruner v. Marcum, 50 Mo. 405; Tower v. Moore, 52 Mo. 118; Mitchell v. Curran, *ante;* Shores v. Bowen, 44 Mo. 396; Bowen v. Sazalare, 44 Mo. 383; Drummond v. Drummond, L. R. 2 Eq. 355; Drummond v. Drummond, L. R. 2 Ch. 32; Collins v. Lewis, L. R. 8 Eq. 708; Dugdale v. Dugdale, L. R. 14 Eq. 234; Peck v. Gurney, 22 W. R. 33; 1 Kent's Com. 463; Byars v. Thompson, 12 Leigh, 550; Pearce v. Danforth, 13 Mo. 360; Hood v. Mathias, 21 Mo. 308; Johnson v. Mason, 27 Mo. 511; O'Flaherty v. Kellogg, 59 Mo. 485; Howard v. Cooper, 1 Hill, 44; Sutton v. Tyrrell, 10 Vt. 91; Brown v. Leavitt, 26 Me. 251; Mullins v. Arnold, 4 Sneed, 262; Dickerson v. Roke, 30 Pa. St. 390; Stewart v. Waldron, 41 Mo. 486; Rixford v. Nye, 20 Vt. 132; M. & D. R. R. Co. v. Porter, 19 Md. 458.

Blakeman & Thayer, for defendants in error, cited: Wag. Stat. 143, sec. 5; Shores v. Bowen, 44 Mo. 396; 44 Mo.

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383; Toler *v.* Hayden, 18 Mo. 399; Walt *v.* Huse, 38 Mo. 210; Fassett *v.* Fassett, 41 Mo. 516; Fields *v.* Oliver, 43 Mo. 144; Howard *v.* Saxton, 1 Denio, 440; Howard *v.* Saxton, 4 Comst. 157; Wells' Arbr., 1 N. Y. Leg. Obs. 189; Bulson *v.* Sohnes, 29 N. Y. 291.

BAKEWELL, J., delivered the opinion of the court.

This is a motion for a judgment upon an award of arbitrators. Plaintiff in error and defendants in error filed with the record the following agreed statement of the case:

On June 5, 1874, plaintiff and defendants, in order to settle a business controversy (and being both members of an association called the "Cotton Association of the City of St. Louis"), executed an agreement of submission to arbitrators, the material parts of which are as follows:

The parties agreed "to submit said difference and controversy to the arbitrament and decision of J. L. Sloss, N. Corrona, F. B. Davidson, H. S. McLaren, and Fred. Von Phul, * * * or a quorum of them, with the right of appeal, on the part of either the above-named parties, to the committee of appeals, according to the rules and regulations of said Cotton Association," etc.

By the submission they agreed further that they would "abide by all the rules and regulations of said Cotton Association, in relation to arbitration, and that the award, when made in pursuance of the submission, might be entered on the records of the Circuit Court of St. Louis county, and a judgment be had thereon * * * in pursuance of the provision of the statute law of the State in cases of arbitration under said statute."

On June 13th four of said five arbitrators (named in the submission) met together, and the respective parties to the submission were all present at said meeting. Whereupon said four arbitrators were duly sworn, according to law, and proceeded to hear the proofs and allegations of both the respective parties, without any objections by either party to such action. The plaintiff and defendants herein appeared

before said arbitrators on said June 13, 1874, and on several subsequent days, to which adjournments of said hearing were regularly made, and then and there said parties, plaintiff and defendants, presented testimony on their respective behalfs. On June 17th both parties announced that they had closed their proofs, and thereupon orally argued their case before said four arbitrators. Afterwards the plaintiff proposed to offer certain additional testimony; whereupon the said four arbitrators took the matter under advisement, and, shortly afterwards, decided to permit the introduction of additional testimony.

Said arbitrators thereupon notified plaintiff and defendants of such decision, and requested their further attendance at a time and place named by said arbitrators; whereupon defendants withdrew from further attendance upon said arbitration, and declined to proceed further therein, and immediately notified said arbitrators of their said withdrawal therefrom, and did not in fact further attend upon said arbitration.

The said four arbitrators, at the time and place appointed by them (as above stated), heard the additional testimony offered by plaintiff, and, on June 26, 1874, published the award, which is the foundation of this action, in which they find for plaintiff in the sum of $2,328.01 and costs ($53).

One of the arbitrators named in the submission did not attend any of said meetings of arbitrators, and was not sworn therein, and did not hear any of the proofs or allegations of the parties, or take part in the decision of the cause. The arbitrator not attending was absent in Europe, which fact was known to all parties.

The award is signed by said four arbitrators, and attested by the seal of said Cotton Association, and by Myron Colony, its secretary.

The parties, plaintiff and defendants, were, at all these times, members of the said Cotton Association; and one of

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the by-laws of that association, in force during all these occurrences, was this:

"Sec. 2. The adjudication committee shall consist of five members of the association, some of whom shall be members of the board of directors. Three of said committee shall be factors and two buyers. It shall be the duty of this committee to hear and decide upon any controversy which may arise between members of this association, and which may voluntarily be submitted to the committee for arbitration. Each member, by an instrument in writing, may agree to submit to the decision of this committee any controversy, and that said instrument may be entered on the records of the Circuit Court of St. Louis county, and that a judgment of the Circuit Court of St. Louis county shall be rendered upon the award made pursuant to such submission, in accordance with the statutes of Missouri. The committee shall appoint a clerk, not of their own number. All persons who may desire the services of this committee shall file with the clerk an agreement, in writing, to submit their cases to the committee, and abide by its decision; and any member may cite another to submit a cause in controversy to the committee, and such other member shall thereupon submit the same as cited. The clerk shall be entitled to a fee of five dollars for each sitting of the committee, said sum to be paid by the party against whom the decision may be made. The proceedings of said committee shall be recorded in a book, to be kept for the purpose, in which shall be entered a summary of each controversy had before it, the award made thereon, and the grounds for such award; said book shall be the property of the Association, and subject to the inspection of the members."

The arbitrators failed to enter, in any book kept for that purpose, a summary of said controversy, or the award made on the grounds thereof.

The aforesaid facts were submitted to the Circuit Court

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in the form of an agreed case, and that court overruled the motion to confirm the award. This judgment was affirmed in the general term, and the plaintiff sued out the writ of error, which brings the case here.

The questions presented for our determination by this statement, which correctly embodies the facts presented in the record, are these:

It is maintained by defendant in error:

1. That a submission to a majority of five arbitrators will not support an award by four, when only four had heard the case.

2. That, even if such an award be good as a common-law award, it cannot be enforced by motion, under our statute.

3. That, even if such an award be good, and enforceable by motion, it was invalidated in this case by the irregularity of hearing testimony after the parties had rested.

4. That the award, in any case, was bad for want of compliance, in essential particulars, with the by-laws above set forth.

1. It is held, both in this country and in England, that, in the absence of any statutory provision to the contrary, in case of a submission to three arbitrators, requiring the award to be signed by any two of them, a hearing and award by two of the arbitrators is good. *Bulson* v. *Lohnes*, 29 N. Y. 291; *Dalling* v. *Matchett*, Willis, 215. The theory is that, by such a clause in the submission, the entire authority is disjoined, so that a majority is empowered to hear as well as to determine.

But—inasmuch as our statute provides that all the arbitrators must meet together and hear all the allegations and proofs—it is held that, in Missouri, all the arbitrators must hear the proofs and act, even where the majority may make the award.

By all the arbitrators is meant, of course, all the arbitrators chosen by the parties, and this need not be all the arbitrators named in the submission. If there is any

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ambiguity about the contract of submission, the parties themselves, by their acts, may fix its meaning.

In the cases of *Bowen* v. *Lazalere* and *Shores* v. *Bowen*, both reported in 44 Mo. 383 and 396, the same award was before the court in each case; the terms of the submission fully appear in the last named case as having been to "W. B. J., W. L. G., and J. L. D., *or any two of them*." The award was by two, and it was held bad. Judge Bliss delivers the opinion of the court in both cases, and says that "the absolute requirement of the statute, that all the arbitrators must meet together and hear all the proofs and allegations of the parties, renders a less number absolutely incompetent to sit." Bowen, one of the parties to the arbitration, did not attend any of the meetings. At the first meeting, all the arbitrators were present, but no evidence was then submitted. The learned judge says:

"The case was heard by two and decided by two. Unless there is some peculiarity in this submission, differing in this respect from others, and choosing in fact but two arbitrators instead of three, this absence from the hearing of the case is fatal to the award. Our statute expressly provides that all the arbitrators must meet together and hear all the proofs and allegations of the parties, but that the award shall be valid if made by a majority only, unless the submission requires the concurrence of the whole.

"Only two of the arbitrators having heard the proofs and allegations, it is no arbitration, and the award cannot bind defendant. The plaintiffs must claim that the submission is peculiar in this: that it chooses two or three arbitrators, as the two or three may happen to meet—that it is uncertain as to numbers; but it expressly names the three, and the statute requires that all should meet."

It is, therefore, the law in Missouri that all the arbitrators must meet, all must hear the testimony, and a majority must agree to the award.

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In the case before the court, in *Shores* v. *Bowen*, this was not done.

If both parties had been present at the hearings; if at each hearing the same two arbitrators had acted; if the award had been signed by two—there can be no question, we think, that those two would have been the two arbitrators named in the submission, and the award would have been good.

But the court held that a submission to three named arbitrators, or any two of them, in the absence of any further act of the parties designating which particular two, did not constitute any two who might happen to act as the arbitrators chosen by the parties, and that, therefore, all three must act, or none.

But in the case before us, as appears by the record and agreed case, the submission was to five named persons, or a quorum of them; these persons, at the date of the submission, constituted the adjudication committee of the Cotton Association, and the cause was submitted to them as such committee.

It was well known to both parties to the submission that one of these gentlemen was not in America. Eight days after the submission the remaining four arbitrators met; the parties were present, the four arbitrators were then and there sworn, and proceeded to take testimony, and both parties attended before the same four arbitrators from day to day, and on every day of the hearing, until they announced their proofs closed, when the case was orally argued before all four arbitrators. To say, under these circumstances, that these four particular named men were not the particular arbitrators selected by the parties, and that, because a fifth was named in the submission—although the submission was to five or a quorum of five—all the arbitrators named did not hear the cause, and that the statute was not complied with, is technicality run mad. Whilst solemn words and grave acts have any meaning

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whatever, this cannot be done. There was a time when respondents might have insisted on the presence of all the five arbitrators; they might have refused to designate the men who should constitute the quorum, but they chose these particular four according to the express terms of the submission, and they will not be allowed to take the chances of victory, and, when the decision is against them, to say that these gentlemen were not their own judges chosen by themselves to try the cause.

The fact is not so. Had the terms of the written submission been explicitly to five, no more and no less, the written submission would have been modified by this consent.

Where a reference was to one, that should have been made by the court to three, but the party complaining appeared before the referee and submitted his cause, the court would entertain no suggestion of irregularity, though the party complaining had had no voice in the appointment. *McShane* v. *Gray*, 13 Iowa, 504.

A submission to two, who might choose one or more if they could not agree. They chose three others. The five met, and the cause was heard in the presence of the parties. The court held they were as much bound as if all the arbitrators had been named in the written submission. 10 Maine, 455.

Woods v. *Page*, 37 Vt. 252, was a case of submission in writing. On the meeting of arbitrators, by mutual verbal consent, matters were submitted not included in the original submission. After the publication of the award, the losing party objected that the award exceeded the submission. It was held that he should not be heard to make such an objection.

In *Akridge* v. *Patillo*, 44 Ga. 585, a controversy was submitted to arbitration under the code, and the arbitrators and parties had several meetings, at which only two arbitrators were present. No objection was made by either party. On motion to make the award a judgment of the

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court, it was held too late to object to such motion on the ground of absence of the third arbitrator.

The Supreme Court says: "It comes too late after the party has taken all chances of an award in his favor, and makes no objection until the award is found to be against him, he having consented to go on before the two arbitrators at the first meeting."

In *Bemus* v. *Clark*, 29 Penn. 253, the award appeared not to be by the arbitrators originally appointed, there having been two other persons substituted.

The court refused to set aside the judgment, saying: "We presume everything to have been regularly done in a matter of report of arbitrators. We do not scan the report as we do the record of proceedings in court; and, even if it appears irregular, we presume the consent of parties, if they were present."

The doctrine is uniform and consistent, from the earlier days of Lord Mansfield, that awards must be liberally construed, and that, in the matter of arbitrations, all critical nicety must be laid aside. This rule would not warrant disregard of a statutory provision.

But the question here is, who were the arbitrators? They were manifestly those whom the parties here chose.

It is evident that they chose the four particular men who in this case heard the evidence and made the award. And, were the fact otherwise, there is a complete estoppel *in pais* on both parties to deny that these four men were the arbitrators of their choice.

We think, therefore, that this award was not only good at common law, but one that must be enforced under our statutes.

2. It is, however, urged that this award, if otherwise good, was invalidated by the irregularity of hearing testimony after the parties had rested.

When the application was made to reopen the case for

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further testimony, the arbitrators took the matter under advisement, and, after deliberation, determined to do so, and gave the proper notice to both parties. There was no error whatever in their proceedings in this respect. The Circuit Court may admit further evidence after the testimony is closed, as has been decided again and again in Missouri. *O'Flaherty* v. *Kellog*, 59 Mo. 485; *Pearce* v. *Danforth*, 13 Mo. 360; and Mo. Reports *passim*. What the Circuit Court can do in this respect, *a fortiori* arbitrators can do. They are not bound by the technical rules which govern courts. This is well-settled law, and it is useless to dwell upon the point.

3. Lastly, we are told that the arbitrators failed to comply with the by-laws in that they did not enter in any book kept for the purpose a summary of the controversy, or the award made, or the grounds thereof. Such a by-law was merely directory, and the neglect of it did not invalidate the proceedings, though the parties, in their submission, agreed to abide by all the rules of the Cotton Association in regard to arbitration—and this was one of them.

Had it been mandatory, it would have been waived by the parties, since no objection to this neglect was made at the time. The violation of this by-law concerns the Cotton Association, and may subject the arbitrators to pains and penalties, perhaps, but in no respect affects the rights of the parties to this award.

As our own Supreme Court says, in *Tucker* v. *Allen*, 47 Mo. 488: "Courts have ever been disposed to encourage the settlement of difficulties by arbitration."

The proceedings in such cases are regarded with favor and construed with liberality. Awards have very rarely been set aside on the ground of non-observance of unimportant technicalities.

The judgment of the Circuit Court must, therefore, be set aside, and, as all the facts are completely before us,

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judgment will be entered here as of date May 4, 1876, for $2,514.25, being the amount of the original award—$2,318.01—and interest at 6 per cent. to the last-named date. The other judges concur.

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ALFRED L. SHORTRIDGE, Defendant in Error, v. LEMUEL G. PARDEE, Plaintiff in Error.

June 6, 1876.

1. Where the debtor does not direct the application of a payment, the creditor may apply it as he thinks proper, provided such application is not inequitable. He is not bound to apply it in the way most beneficial to the debtor.
2. This application of payment may be made by the debtor at any time before suit, where the debtor made no application at the time of the payment.

ERROR to St. Louis Circuit Court.

Affirmed.

W. F. Rogers, for appellant, cited: Benny v. Rhodes, 18 Mo. 147; Droffin v. Booneville, 8 Mo. 395; Chaney v. Richardson, 34 Mo. 370; Heitz v. Cohen *et al.*, 29 Ill. 313; 1 Scam. (Ill.) 196; 36 Ala. 482; United States v. Kirkpatrick, 9 Wheat. 737; United States v. Wardell, 5 Mason, 82; Stamford Bank v. Benedict, 15 Conn. 437; Stone v. Seymore *et al.*, 15 Wend. 19; Briggs v. Williamson, 2 Vt. 283; New March v. Clay, 14 East, 239; Manyette v. White, 2 Stark. 101.

L. Babcock, for respondent.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on a negotiable promissory note, dated June 8, 1872, payable to the order of plaintiff two years after date, for $500, with interest from date at 10 per cent. The note is signed by M. C. McMelan and the defendant.

The answer of defendant sets up that he signed the note for the accommodation of McMelan; that the note was executed

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by McMelan as principal, and defendant as surety; and that, before the maturity of the note, the same was paid by McMelan, who, in August, 1873, paid to plaintiff $1,000, which was received by plaintiff on the understanding and agreement that he would apply that sum first to the payment of the note sued on, and then credit the remainder upon another note made by McMelan, secured by deed of trust, and owned by plaintiff.

Plaintiff filed a replication denying all these allegations of the answer.

There was a verdict and judgment for plaintiff, and, defendant having filed a motion for a new trial, which was overruled, the cause is brought here by writ of error.

On the trial it appeared that, at the date of the execution of the note sued on, plaintiff held two other notes made by McMelan, and both secured by deed of trust, one dated March 1, 1872, for $3,000, payable four years after date, with interest at 8 per cent., and one dated May 1, 1872, for $1,000, at three years, with interest at 10 per cent.; that Pardee signed the note sued on for the accommodation of McMelan, and that McMelan paid Pardee $1,000 on September 17, 1872.

McMelan swears that this money was paid on the terms set forth in the answer, but plaintiff, Shortridge, swears that there was nothing whatever agreed, at any time, as to the application of the payments, and nothing said about the matter at the date of the payment, and that he afterwards told McMelan that he should apply this payment of $1,000 as a credit on the $3,000 note. Defendant asked the court to instruct the jury that "if the jury believe from the evidence that prior to the execution of the note sued on, that McMelan had executed other notes to plaintiff, for the sum of $4,000, secured by deeds of trust, which have not matured, and that, after the execution of the note sued on, and before the maturity of same, the said McMelan paid plaintiff the sum of $1,000, it was the duty of plaintiff to apply so much

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of said money as was necessary to the payment of said note sued on, unless the jury further believe that there was an express contract, at the time of said payment, that said money so paid should be applied to the payment of the notes secured by deeds of trust which have not yet matured."

Defendant also asked the following instruction:

"If the jury believe from the evidence that defendant, Pardee, signed the note sued upon as security, then said defendant was entitled to notice and protest, and unless the jury believe from the evidence that said note was protested for non-payment, or that the defendant, Pardee, waived the same, then plaintiff cannot recover, and the jury will find for defendant."

These instructions were refused, and the court gave the following instructions of its own motion:

"The court instructs the jury to find for the plaintiff, unless they believe from the evidence that, at the time of the payment of the sum of $1,000, it was agreed or understood between McMelan and the plaintiff that said sum was to be applied in extinguishment of the note sued on. The burden of establishing such an agreement or understanding rests on defendant.

"If the jury find for the plaintiff, they will return a verdict for the amount of the principal of said note, and interest at 10 per cent. per annum from June 8, 1872."

The general rule as to application of payment is that, where a debtor owing several debts makes payment to a creditor, the debtor has a right to apply it to whatever debt he pleases. If he makes no specific appropriation, the creditor may apply it as he pleases; where neither party appropriates it, the law will apply it. The instructions asked by plaintiff in this case were manifestly erroneous, and were properly refused. The instruction given by the court was a correct statement of the law applicable to the case. There was evidence to support the verdict.

McMelan and Shortridge contradicted each other, and the jury believed Shortridge. *Quicquid solvitur, solvetur secun-*

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dum modum solventis is the rule, but that rule had no application unless the jury believe that McMelan had, at the time of payment, directed to which note the money should go. The creditor here applied it to a note secured on real estate of the debtor rather than on the note that had no such security; in this he is considered by law to have acted for the interest of the debtor.

He applied it on a note bearing 8 per cent. rather than on one bearing 10 per cent.; in this he acted for his own interest. In our law a creditor receiving money is not bound, in the absence of instructions, to apply it in the way most beneficial to the debtor.

The principle laid down by Chief Justice Marshall, in *Field* v. *Holland*, 6 Cranch, 8, and approved by Chancellor Walworth, in *Stone* v. *Seymour*, 15 Wend. 29—that the debtor, by neglecting to direct the application of a partial payment, tacitly surrenders the right to the creditor, and enables him to apply the payment as he thinks proper, provided such application is not inequitable—is undoubtedly true.

It does not appear from the evidence precisely when the indefinite payment made was applied by the creditor, in the case at bar, to one particular demand. But this does not seem to be material. In England it is said that the creditor may make the application at any time, even after litigation, unless the debtor does so at the time of payment; whilst in this country it has been held too late for the creditor to exercise the right of election after suit. In this case the money was paid in September, and McMelan was notified of its appropriation in the ensuing February. There is nothing whatever to show that the entry of credit was not made on the $3,000 note on the very day that the money was received.

We see no error in this record, and the judgment of the Circuit Court is affirmed, with the concurrence of all the judges.

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CLERKS' SAVINGS BANK, Appellant, v. MARY THOMAS *et al.*, Respondents. 2 367 49 606

June 6, 1876.

1. A non-juridical day, on which no record can be kept, is not to be reckoned in calculating time for filing pleas or motions.
2. Notice to a director of a bank of facts affecting the character of negotiable paper is notice to the bank.

APPEAL from St. Louis Circuit Court.

Affirmed.

D. W. Sadler, for appellant, cited: Northamton *v.* Mississippi Valley Ins. Co., 47 Mo. 444; Walled *v.* Parker, 6 Wend. 616; Woodhull *v.* Holmes, 10 Johns. 231; DeBaum *v.* Atchison, 14 Mo. 543; Mechanics' Bank *v.* State Board, etc., 10 Wall. 646; Patter *v.* Dillon, 7 Mo. 228; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 14 N. Y. 623, and 16 N. Y. 125; Smith *v.* Clark & Co., 54 Mo. 58; State of Illinois *v.* Delefield, 2 Hill, 159; Gullick *v.* Glover, 33 N. J. L. (400) 463; McFarland *v.* Bellews, 49 Mo. 311; Alexander *v.* Harrison, 38 Mo. 258; Story on Ag., secs. 55, 59, 87, 92, 104; Weaver *v.* Ogletree, 39 Ga. 586; The State *v.* Homes, 17 Mo. 379; Chappell *v.* Allen, 38 Mo. 213; Rose *v.* Spies, 44 Mo. 20; National Bank *v.* Currie, 44 Mo. 91; Meyer *v.* Pacific R. R. Co., 45 Mo. 137; Mead *v.* Brutherton, 30 Mo. 201; Exchange Bank *v.* Monteith, 36 N. Y. 505; New York & New Hampshire R. R. Co. *v.* Schnyder *et al.*, 34 N. Y. 30; Magee *v.* Badger, 34 N. Y. 247; Grisnole *v.* Haven, 25 N. Y. 602.

Krum, Madill & Jewett, for respondents, cited: Wag. Stat. 1059; National Bank of the Metropolis *v.* Williams, 46 Mo. 17; Wenst *v.* Schroeder, 40 Mo. 602.

BAKEWELL, J., delivered the opinion of the court.

This is a suit on two negotiable promissory notes—one for $4,000, made by Thomas P. Morse and John D. Daggett,

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payable to the order of the Sectional Dock Company, and indorsed, "Sectional Dock Co., by Charles Drew, jr., Fin. Agt.," and also indorsed by Charles Drew, jr.; the other note is for $12,000, signed, "Sectional Dock Co., by Charles Drew, jr., Fin. Agt.," payable to the order of T. P. Morse & Co., and by them indorsed to plaintiff.

The defense is that defendants, who are said to have been members of a copartnership called the Sectional Dock Company, never authorized the making or indorsing of this paper, which was made and indorsed by Charles Drew, jr., then secretary and business manager, for the accommodation of the firm of T. P. Morse & Co., of which he was a member, and that plaintiffs had notice of this fact.

The case is one growing out of the state of facts fully set out in the opinion rendered at this term in the cases of *Edwards* v. *Thomas* and *Whittaker* v. *Thomas*. A fuller statement is not needed for the purposes of this opinion.

There was a verdict and judgment below for defendant, and plaintiff brings the cause here by appeal.

It is said by counsel for respondent that, inasmuch as no exceptions were saved to the rulings of the court below, in giving or refusing instructions, and because the motion for a new trial was not filed within four days, there is nothing in this record at which we can look.

We think the motion for a new trial was filed in time. The verdict was rendered on Saturday, March 14th, in court-room No. 5. On the Monday following, according to its rules, the Circuit Court was sitting in general term. On March 16th, 20th, and 23d, and on no other days, up to the date of filing this motion, Circuit Court No. 5 was in actual session. On the 23d the motion for a new trial was filed. This was a compliance with the law. The days are to be juridical days—court days—on which minutes are kept. The fact that the Circuit Court was sitting in general term did not make the days in which Court No. 5 was not in session, at

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special term, juridical days of Court No. 5. A day of which no record can be kept is not to be counted as a day in calculating time for filing either pleas or motions in cases pending in court

No exception having been saved to the action of the Circuit Court in granting or refusing instructions, we shall not examine the declarations of law given by the court to the jury.

The only matter which this record saves, and which is before us for consideration, is the action of the court in admitting certain testimony given by Charles Drew.

Drew testified that he told one Thaw in regard to the $4,000 note, before it was offered to plaintiff for discount, that the proceeds of the note were to go to the benefit of Morse & Co. Thaw was a director of the plaintiff, as the evidence shows, and was present at the board as director when the note was offered for discount and received by the bank. We think this evidence quite competent, as tending to show notice to the bank that the paper was made for the accommodation of Morse & Co., and not of Sectional Dock Company, and putting them on inquiry as to Drew's power and authority to make or indorse paper in the name of the Dock Company for any such purpose.

There being no error in this action of the court, and nothing else appearing on the record upon which we are called upon to pass, the judgment of the Circuit Court is affirmed. The other judges concur.

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J. W. KIRBY *et al.*, Respondent, *v.* ADAMS EXPRESS COMPANY, Appellant.

June 6, 1876.

1. **All persons following the occupation of carrying goods by land or water are common carriers.**

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2. A common carrier, by special contract, can limit his liability at common law; but, notwithstanding the special contract, he remains a common carrier with his common-law liability restricted, in so far as it may be lawfully restricted by the contract.

3. A clause in a contract between an express company and a shipper stated that goods shipped are of the value of $50, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than $50 unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss.

4. A common carrier may, by contract, restrict his liability as an insurer, but he will not be permitted to assume the position of an ordinary bailee; the law still holds him to a higher degree of care than that required of a private carrier, and the rule as to the burden of proof still prevails; and, if the goods are lost, whatever may have been the agreement with the shipper, the law will presume that they were lost through the fault of the carrier, unless the carrier show the contrary.

5. As the law compels the carrier to take goods for transportation, it may be difficult to see what consideration there is to support a contract for a release of the carrier from responsibility, yet it is a matter with which the courts can no longer deal.

APPEAL from St. Louis Circuit Court.

Affirmed.

S. M. Breckinridge, for appellant, cited: Railroad Co. *v.* Lockwood, 17 Wall. 357; Wolf *v.* American Express Co., 43 Mo. 426; Behme *v.* Adams Express Co., 25 Md. 328; Boorman *v.* American Express Co., 21 Wis. 152; Newburger *et al. v.* Howard & Co.'s Express, 6 Phila. Rep. 174; Newstadt *v.* Alvin Adams, 5 Duer, 43.

Silas B. Jones, for respondents, cited: Levering *v.* Union Trans. & Ins. Co., 42 Mo. 88; Wolf *v.* American Express Co., 43 Mo. 421; Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 *Ib.* 363; Bondenham *v.* Bennett, 4 Price, 31; Beck *v.* Evans, 16 East, 244; Chitty on Car. 141; 2 Stark. on Ev. 205; Story on Bail., sec. 590; American Express Co. *v.* Sands *et al.*, 55 Pa. St. 140; Orndork & Co. *v.* Adams Express Co., 3 Bush, 194; Southern Express Co. *v.* Moon, 39 Miss. 822.

BAKEWELL, J., delivered the opinion of the court.

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Respondents sue for the value of a trunk and contents, delivered by respondents to appellant for transportation. At the time of the delivery of the trunk, appellant delivered and respondents accepted a receipt, being a printed form used by the express company, which, the blanks being filled up, read as follows:

"Adams Express Company. Great Eastern, Western, and Southern Express Forwarders. Form 14. [Domestic Bill of Lading.] St. Louis, Mo., December 24, 1872. Received of Prince & Kirby, one trunk. Value, $——. For which this company charges $——. Marked J. W. Kirby & Co., Bethel Station, Tenn.

"Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation.

"It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean, or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specifically insured by them, and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company. And if the same is intrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do), such person or company so selected shall be regarded exclusively as the

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agent of the shipper or owner, and as such alone liable, and the Adams Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to, and inure to the benefit of, each and every company or person to whom the Adams Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event shall the Adams Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office, within thirty days after this date, in a statement to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shipper's risk only; and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed or secured for transportation. It is further agreed that said company shall not in any event be liable for any loss, damage, or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection, or riot, or the dangers incident to a time of war, or by any riotous or armed assemblage. If any sum of money, besides the charge for transportation, is to be collected from the consignee on delivery of the above-described property, and if the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property, while in its possession for the purpose of making such collection, shall be that of warehousemen only. For the company. Freight, $——.

"E. W. HASSELL."

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Respondents declare on the receipt, allege that appellant was a common carrier, and that the trunk and contents were reasonably worth $160, and were lost through the carelessness and improper conduct of appellant.

Appellant denies the loss of the trunk and contents; denies all carelessness and improper conduct; denies that it was a common carrier; asserts that it received the trunk and contents under the agreement sued on, and subject to its express conditions, amongst which were those that it accepted no other liability than that of a forwarder; and that, as the value of the trunk and contents were not stated, it was in no event to be held liable for more than $50, at which sum the parcel was valued.

The replication denies all new matter in the answer.

The court, at the instance of respondents, granted instructions which substantially declare: That appellant—if, being publicly engaged in transporting goods for hire, it received respondents' goods for transportation—was a common carrier in this case; that, if appellant was a common carrier, it must account for these goods, and, if they were lost while in its possession as a common carrier, the law presumes they were lost through the carelessness and negligence of appellant, unless it show the contrary; and that, if appellant was a common carrier, and the goods were lost through its carelessness and negligence, then it was liable for the full value of the goods.

Appellant asked instructions limiting the recovery to $50, stating that, if the receipt contained no specified value of the goods, only $50 could be recovered, laying the burden of proof of carelessness on respondents, and to the effect that, under the contract, appellant had no liability but that of a forwarder.

These instructions were refused, but the following instructions were granted at defendant's instance:

"If the jury believe from the evidence that the receipt in evidence was given by defendant to the plaintiffs at the

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time said goods were shipped, and for the same, and was accepted by plaintiffs, then said receipt constitutes the contract under which the goods were received, and the parties were bound by the terms thereof."

There was a verdict and judgment for $151.75, the full value of the trunk and contents. The case is brought here, by defendant, by appeal.

It is strongly insisted by appellant that this is not a question of notice limiting the carrier's liability; that the receipt executed by appellant, and deliberately, and with full knowledge and understanding of its contents, and freely, accepted by respondents, constituted a contract between them, to the terms of which they are, both by reason and authority, to be strictly held. The value of the contents was not disclosed, and, as in the analogous case of a valued policy, the amount of risk being fixed by agreement, that amount is the measure of recovery in this case.

The point made in the case is one of the greatest importance to the business community. The decisions on the subject have not been uniform, and are not now accordant; and the current of decisions and legislative enactments, both in England and America, shows that the most opposite views of public policy in this matter have prevailed amongst legislators and jurists at different periods.

There is no doubt at all that, wherever the common law prevails, the rule that all persons following the occupation of carrying goods for hire, by land or water, are common carriers, and liable, except for inevitable accidents, has been maintained in all its most wholesome vigor. But the doctrine that special acceptances limit responsibility of carriers—at first timidly urged, and viewed with disfavor—at last, by repeated adjudications, grew into a system, and this under the observation and sanction of the legislature, which, by repeated enactments, from 2 George II. to 53 George III., allowed the rule to be relaxed by special contracts created by bills of lading, until, in this century,

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by reason of the practice of sending small parcels of very great value, the responsibility of carriers having greatly increased, an act was passed in England that no carrier shall be liable for the loss of articles of that description unless the value is declared at the time of delivery, and an increased price paid for carriage.

The common-law rule was: "A politic establishment contrived by the policy of the law," as Lord Holt declared, "for the safety of all persons the necessity of whose affairs oblige them to trust this sort of persons, that they may be safe in their way of dealings;" and Lord Mansfield said that, "to prevent litigation, confusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows the loss was caused by the King's enemies or a tempest; and in case of robbery it holds him liable, of which the true reason is, for fear it may give room for collusion—that the carrier may contrive to be robbed on purpose to share the spoil."

In the case at bar the carrier seeks, by the terms of the receipt which he gives, to limit his responsibility to the sum of $50, and to change his common law-liability, which is that of an insurer, to the liability of an ordinary bailee for hire.

In *Gould* v. *Hill*, 2 Hill, 623, it was decided in New York that this cannot be done, and in Georgia and Ohio the same doctrine was laid down, but the Supreme Court of the United States, in *N. J. Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, denied the doctrine of *Gould* v. *Hill*, which was subsequently overruled in New York; and it is now almost universally held in America that such contracts are valid. The strict rule has also been abandoned in England, and such contracts are sanctioned there. And the doctrine is now too well established in this state to be shaken that a common carrier can by special contract limit his liability at common law. *Read* v. *St. Louis, Kansas City & Northern Railway Company*, 60

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Mo. 199. As the law compels the carrier to take the goods, and he is liable to an action if he refuses, it may be difficult to see what consideration there is to support a contract by which the bailor agrees to release the bailee from a responsibility imposed by law; and it will still be thought by many that the established doctrine opens a wide door for theft and perjury—gives to the carrier every advantage in a suit, and puts the carrying trade of the country at his mercy. If the present rule, however, is against public policy, it is a matter with which the courts can no longer deal. Recent legislative enactments in England have brought about, to a great extent, a return to the earlier principles of the old decisions, which hold the carrier to the strictest responsibility; and in this country, as is said by the learned judge who delivered the opinion of the court in *Southern Express Company* v. *Moon*, 39 Miss. 831, "consignors have only to insist on a simple receipt for their goods, offering to pay reasonable compensation, and steadily refusing the artfully prepared receipts limiting the carrier's liability and depriving the consignor of his legal rights, to restore in practice the security and safety which the law affords. They will, in this manner, avoid the losses which scheming corporations, under the guise of special agreements, are daily inflicting upon them." The possibility of such action in isolated cases, by individual consignors, will be found in practice, however, no efficient remedy against an increasing evil.

Without denying that cases may daily arise in which these printed receipts, thrust into the hands of a hurried traveler, constitute no contract limiting the carrier's liability, for want of intelligent, free, and fair assent, there can be no question that the liability of appellant in this case was in fact limited by the receipt received by the consignor. Appellant remained a common carrier, but, in this instance, his common-law liability was restricted—so far as it might be lawfully restricted—by contract.

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But it was not possible for appellant, by the terms of this contract, to shield himself from liability for his own carelessness and neglect in carrying these goods. No bailee for hire, I think, can limit his liability so as to escape responsibility for his own neglect; certainly a carrier cannot. Had a loss occurred without any fault of the carrier, under the contract sued on, his liability was limited to $50; but, where it appears that the loss occurred by his fault, he must pay the full value of the goods; otherwise, the law would become a shield for the grossest fraud.

There was, I think, sufficient proof of actual negligence in this case to warrant the finding of the jury; but that is not material, because a presumption of negligence would arise from the mere fact of the loss. There can be but little doubt as to what is the doctrine in this State on the subject. A common carrier may, by contract, restrict his liability as an insurer, but his duties as a common carrier do not originate in contract, and he will not be permitted, whilst acting as a common carrier for hire, to shirk the responsibilities which the law affixes to his calling, and to assume the position of an ordinary bailee. The law still holds him to a higher degree of care than that required of a private carrier; and the rule of evidence which, for the wisest reasons, has been adopted in his regard, must still prevail. The consignor does not accompany his goods; the carrier does. The carrier must account for them, and if they are lost, whatever agreement he may have made with the owner, the law will presume that they are lost by his fault, and, in the absence of testimony to rebut this presumption, he must pay their value. This doctrine seems to be clearly laid down in *Levering* v. *Union Transportation and Insurance Company*, 42 Mo. 88, and the point is expressly decided in *Ketchum* v. *American Merchants' Union Express Company*, 52 Mo. 391.

We see no error committed by the Circuit Court of which appellant can complain. The instruction given for defend-

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ant was liable to be misunderstood, to the prejudice of respondents, and should not have been given without modification; but its apparent inconsistency with the law, as correctly embodied in the instructions given for respondents, is not an error affecting the appellant.

The judgment of the Circuit Court is affirmed. All the judges concur.

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HENRY D. MCHENRY, Plaintiff in Error, *v.* ELIHU A. SHEPHARD *et al.*, Defendants in Error. (Two cases, same parties.)

June 10, 1876.

1. A statement, filed in the Circuit Court, which declares that A had made and delivered his negotiable promissory note, promising to pay to the cognizor, six months after date, $8,750, for value received, etc., which was indorsed by the cognizor, and B, C, D, and E, and then held by F, and which was protested for non-payment, and was due and unpaid, is not sufficient, under sections 21, 22, Article 11, Wagner's Statutes, 1055, to warrant the court in rendering judgment against the cognizor by confession.
2. The other creditors of the cognizor have an interest in knowing whether the note, in its origin, was business or accommodation paper; whether it was indorsed by the cognizor for value or for accommodation; whether it was indorsed before or after maturity, whether due notice of its dishonor was given by the holder, and upon what terms the holder took it. A statement which is silent on all these heads is not a compliance with the letter or spirit of the statute.

ERROR to St. Louis Circuit Court.

Affirmed.

Samuel Reber and *William F. Causey*, for plaintiff in error, cited: Mann *v.* Brooks, 7 How. Pr. 450; 7 How. Pr. 460; Gilman *v.* Hovey *et al.*, 26 Mo. 280; Bryan *v.* Mitchell, 28 Mo. 32; How *v.* Dorsheimer, 31 Mo. 349; Whitney *v.* Kenyon, 7 How. Pr. 460; Gen. Stat. 682, secs. 21, 22, and 24; Horton *v.* Bayne, 52 Mo. 531; Corby, Exrx., *v.* Butler, 55 Mo. 398; Chitty on Bills, 637; Farr *v.* Woods, 2 M. & W. 844; Merrick *v.* Phillips, 58

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Mo. 436; Bennet *v.* Torlina, 56 Mo. 309; Gaudal *v.* Finn, 23 Barb. 652; Dunham *v.* Waterman, 17 N. Y. 9; Whitney *v.* Kenyon, 16 Johns. 149; Acker *v.* Acker, 1 N. Y. Ct. of App. 1; Clement *v.* Gerow, 1 N. Y. Ct. of App. 370.

Dryden & Dryden and *G. S. Van Wagoner*, for defendants in error, cited: Wag. Stat. 1055, sec. 22; Waites' Am. Code, 727, sec. 383; Chappel *v.* Chappel, 12 N. Y. 215; Dunham *v.* Waterman, 17 N. Y. 9; Frost *v.* Koon, 30 N. Y. 440; Gundal *v.* Finn, 23 Barb. 652; Purdy *v.* Upton, 10 How. Pr. 494; Gilman *v.* Hovey, 26 Mo. 288; Bryan *v.* Miller, 28 Mo. 32; How *v.* Dorsheimer, 31 Mo. 350; Edgar *v.* Greer, 7 Clark, 136; Bernard *v.* Douglass, 10 Iowa, 370; Freem. on Judg., secs. 543, 558; Nichols *v.* Kribs, 10 Wis. 76; Thompson *v.* Hintgen, 11 Wis. 112; Wag. Stat. 1062, sec. 26; Downing *v.* Still, 43 Mo. 316; Harkness *v.* Austin, 36 Mo. 47; Harbor *v.* Pacific R. R. Co., 32 Mo. 426; Wag. Stat. 216, sec. 11; Farrell *v.* Fritschle, 30 Mo. 190; Bonnell *v.* Henry, 13 How. 144; Bernard *v.* Douglass, 10 Iowa, 370; Wag. Stat. 790, sec. 3.

Gantt, P. J., delivered the opinion of the court.

These two cases may be considered together. In the latter a stipulation is filed that the determination of the first shall be decisive of the second.

On May 5, 1875, there was filed in the Circuit Court of St. Louis county a statement reciting that, whereas, on October 22, 1874, D. Robert Barclay had made and delivered (it is not said to whom) his negotiable promissory note, of that date, promising to pay, six months after date, to the order of Elihu H. Shephard $8,750, for value received, with 10 per cent. interest, which note was indorsed by said Shepard, Stilson Hutchins, Henry W. Williams, Theophile Papin, Trusten Polk, and Wm. H. McHenry, and was then held by McHenry, and that said note was due and unpaid, and had been protested for non-payment; therefore, Elihu H. Shepard, payee and first indorser, authorized

and requested the St. Louis Circuit Court to enter up a judgment against him for the full amount of the principal and interest of said note, with costs of protest and damages, in favor of McHenry, the holder, at the April term, 1875, or any subsequent term, of the St. Louis Circuit Court. This statement was signed and sealed by Shepard, and verified by his affidavit, on May 4, 1875, before Charles E. Bradley, notary public. Whereupon, McHenry, appearing by his attorney, and moving the court thereto, it was considered by the court that McHenry do recover of Shephard the debt aforesaid, as confessed, and also his costs and charges, etc. In this entry were recited the following facts:

1. That it appeared to the court that E. H. Shepard was indebted to the said McHenry in the sum of $9,582.29, and for that amount confessed judgment and authorized the entering up of the same.

2. That the indebtedness is founded on a negotiable promissory note, etc., which note was made by D. R. Barclay, and indorsed by Shephard, the payee, and also by Hutchins, Williams, Papin, Polk, and McHenry, and was held by McHenry.

3. That the court was satisfied "that the same is justly due, and that defendant executed the statement in writing, made affidavit thereto, as required by law, and that defendant is the same identical person who made said statement and affidavit."

On October 26, 1875, the National Bank of the State of Missouri filed a motion to set aside said judgment, on the ground that the same was irregular and void, because the amounts, averments, and statements contained in the statement were not in compliance with the statute; that the statement did not state concisely the facts out of which it arose; did not show that the sum confessed was justly due, or to become due, as required by the statute; and that, on April 19, 1875, a judgment was obtained in the St. Louis Circuit Court, in favor of the mover and against Shepard,

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for $16,619.98, which remains unsatisfied; that execution issued thereon had been levied on certain real estate of Shepard to satisfy the same; that McHenry had also sued out execution on his judgment, and caused it to be levied on the same property; and that he had caused the property to be advertised for sale thereunder, on October 27, 1875, and October 30, 1875, "and is advertising his said judgment and claiming his execution levies to be valid and of full force and effect, and superior in point of time, and as to its lien, to the judgment and execution levies of your petitioner" (the National Bank of the State of Missouri). Whereupon the bank prayed that the judgment in favor of McHenry be set aside and the execution recalled, etc.

This motion came on to be heard on October 26, 1875 (it may be stated that the record in this case is very carelessly transcribed, and abounds in blunders of the most palpable nature), and the entry of the judgment then rendered shows that the motion was filed on October 15, 1875 (it had been previously alleged to have been filed October 26, 1875); that, on October 26, 1875, the parties—that is to say, the bank and McHenry—presented their proofs, and thereupon the court found that the facts stated in the motion are true, and that the movers are subsequent judgment creditors of Shepard, and that McHenry's judgment is irregular and should be set aside; and it was done accordingly, and the execution recalled.

By the bill of exceptions it appeared that the movers put in evidence the record of a judgment obtained on April 19, 1875, by the *National Bank of the State of Missouri* v. *Shepard* et al., for $16,619.98, on which an execution issued on October 22, 1875; also, the record in the case of *McHenry* v. *Shepard*, and an execution issued thereon, October 2, 1875; also, a motion to set aside the order of the court on October 26, 1875, sustaining the motion to set aside the judgment confessed, with a saving of all exceptions, etc. There was an appeal to the general term, an

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affirmance *pro forma*, and the case comes before us on writ of error.

1. The point before us is, not the validity of a judgment confessed by the party in open court in person or by virtue of a warrant of attorney, according to the practice which was in this State familiar to the profession prior to 1849, but of a judgment taken under the provisions of our statute, borrowed in that year from the New York Legislature, and substantially continued to the present time. It is well known that the principal object proposed by the advocates of the new code of practice was the simplification of legal proceedings. This purpose was professed, and there is no doubt that it was sincerely entertained. The numerous cases cited by the industry of counsel, in which the attempt on the part of creditors to avail themselves of the compendious and untechnical methods supposed to be furnished by the code for securing their demands by judgment, illustrate, for the thousandth time, the doubtful wisdom of innovating upon a course of practice confirmed by the most careful reflection of generations of learned and painstaking men.

The requirements of the statute are somewhat stringent. As they were in force when this statement was filed, they are conveyed in the following terms:

"Section 21. A judgment by confession may be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of defendant, or both, in the manner herein prescribed.

"Section 22. A statement in writing must be made, signed by the defendant, and verified by like affidavit, as in case of an answer, to the following effect: First, it must state the amount for which the judgment may be rendered, and authorize the entry of judgment therein; second, if it be for money due or to become due, it must state concisely, *and show*, the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due; third, if it be for the purpose of securing the plaintiff

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against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same.

"Section 23. Such statement and affidavit shall be filed, and the court shall render judgment for the amount confessed and cause the same to be entered upon the records, first being satisfied of the identity of the defendant, if present; or, if he be not present, that he executed the same [what is 'the same?'], and made the affidavit hereinbefore required."

These three sections are nearly identical with the 1st, 2d, and 3d sections of Article 22 of the Practice Act of 1849 (Session Acts, p. 91). They are taken almost *verbatim* from the code of New York.

There have been many instances in which the validity of judgments confessed under these provisions has been judicially examined in New York, and three of such instances in Missouri have been brought to our attention.

We consider it plain that the object of the provisions we have quoted was to secure, in the statement of the facts out of which a debt to be secured by confession of judgment arises, a much more minute and elementary detail than would suffice in a declaration. A proceeding between A and B, who appear as litigants, postulates a controversy and contending parties. When B comes into court voluntarily to confess an indebtedness to A, and to secure it by judgment, there is room for collusion and preference. The law does not forbid preferences absolutely and without qualification, because obedience to such an order would be what it could not, in the nature of things, enforce; but it regards preferences with jealousy, and insists upon their not being fraudulent. In order that they may not be tainted with fraud, it refuses the aid of legal process to effect a preference unless very rigid precautions are observed against the admission of fraud. It does not suffice that fraud, if proved, will vitiate the transaction. This is a rule

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which governs all dealings between man and man. Both when the forms and machinery of law are made use of to effect a preference, by giving to a particular creditor a judgment at an earlier day than that at which the other creditors of the party can put their demands—perhaps equally meritorious from every point of view, and certainly of equal validity in the eye of the law—in the same advantageous position, the statute law of Missouri demands a compliance with certain requirements, aimed at the fullest disclosure to all concerned, of the good faith of the proceeding, if it be really honest, or, if it be otherwise, of the particular theory by means of which a fraud is projected. There is no toleration of concealment or disguise. The whole business must be laid bare, so that all concerned may see and judge it. Such seems to be the intention of the New York code, for which may be consulted pages 389, 390 of Voorhies' Third Edition and Supplement, chapter 3, section 383. It is to be observed that this provision, which was adopted in New York in 1848, was a material relaxation of the stringency of the rule prescribed by the act of 1818, construed by the case of *Lawless* v. *Hackett*, 16 Johns. 149. But up to this time we had in Missouri no statutory regulation at all approaching either of these in strictness. In 1849, however, we adopted the New York statute bodily. The act of 1865, which prevails to this day, attempts the same thing, and succeeds except for the clerical error committed by the transcriber of that day. The section of the New York statute has been the subject of frequent discussion by the courts of that state; and we have examined the cases referred to by counsel on both sides: *Chappel* v. *Chappel*, 12 N. Y. 215 (decided in 1855); *Dunham* v. *Waterman*, 17 N. Y. 9 (1858); *Lanning* v. *Carpenter*, 20 N. Y. 447 (1859); *Freligh* v. *Brink*, 22 N. Y. 418 (1860); *Neusbaum* v. *Keim*, 24 N. Y. 325 (1862); *Acker* v. *Acker*, 1 Keyes, 291; *Clement* v. *Gerow*, Ib. 297; and *Gandell* v. *Finn*, Ib. 217—all decided in 1864—and *Union Bank* v.

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Bush, 36 N. Y. 631, decided in 1867. Our own Supreme Court adopted the two first of these decisions, which were all that had been brought to their notice up to 28th Mo.; the three decisions of our court to which we are referred being *Gilman* v. *Hovey* et al., 26 Mo. 280; *Bryan* v. *Miller*, 28 Mo. 32; and *How* v. *Dorsheimer*, 31 Mo. 349. We are, indeed, referred to an earlier decision of the Supreme Court (corresponding to our Circuit Court) of New York, at the Saratoga special term, February, 1853, reported in 7 How. Pr. 449 *et seq.* (*Mann* et al. v. *Brooks*); but we do not think this case as deserving of attention as the decisions of the Court of Appeals twice made—not to speak of the rulings of our own Supreme Court, which are supreme authority for us.

No case to which we are referred (except, possibly, that reported in 7 How. Pr. Rep.), either in New York or Missouri, goes to the length of upholding the statement made in the case at bar as sufficient to authorize a judgment by confession. The consideration of the note executed by Barclay does not appear. It is not even alleged to have been valuable—for this can scarcely be inferred from the recital in the note that it was "for value received." It does not appear why Shepard indorsed the note to Hutchins. It may have legitimately been an accommodation indorsement, or an indorsement for value; but the two are not for all legal purposes equivalent, and creditors have a right to be told which of them it was. This statement tells them nothing. Whether the note was held by McHenry for value before maturity is a very material fact; but on this point the statement is silent. Stress is laid, by counsel for appellants, on the fact that McHenry is not the payee, but the indorsee, of the note. We do not see that this circumstance, without more, gives him an advantage over the payee. If he were the *bona fide* indorsee for value before maturity of negotiable paper, he would be safe from several defenses which may be set up as between maker and

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payee. But this character should appear, at least in statement, before the court will be at liberty to invest him with its privileges.

We are, then, of opinion that, according to the views expressed by the Supreme Court of Missouri in *Bryan* v. *Miller*, 28 Mo. 32, and *How* v. *Dorsheimer*, 31 Mo. 349, the statement on which the judgment was confessed in this case is materially defective, and the judgment should be set aside at the suggestion, and on motion, of any subsequent or cotemporaneous judgment creditor—any judgment creditor, in fact, whose security is impaired by it. It only remains for us to inquire whether the parties moving in these two cases come within this description.

In the first, No. 220, the motion is made by the National Bank of the State of Missouri, and it declares that, on April 19, 1875, it had obtained a judgment against Shepard and Barclay for $16,619.98. On this account, and because McHenry had gained the advantage of an earlier execution and levy in another county (though the last circumstance is very obscurely referred to), the bank asks that the judgment confessed in McHenry's favor, on May 5, 1875, be set aside—vitiated as it is by the imperfection of the statement. The court, considering this motion, finds that the bank is a "subsequent judgment creditor" to McHenry, and set aside the judgment accordingly. This finding is, of course, an inadvertence. The judgment of the bank was prior in point of time. The lien of the two judgments commenced, as between the Bank and McHenry, on the last day of the April term, during which both were given. They were cotemporaneous, therefore, for the purpose of the security resulting from their rendering. But the case is fully within the reason and principle of those cited from the Missouri decisions; there is no doubt of the facts; and the judgment of the Circuit Court must be affirmed.

In No. 241 the party moving *is* a subsequent judgment creditor, who became such at the term following that when

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the judgment in favor of McHenry was confessed. Besides, there is an agreement of counsel filed in the cause that the decision in No. 220 shall govern this in 241. Such is also the necessary result of the facts shown by the record.

The judgment will, therefore, be affirmed. All the judges concur.

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SKRAINKA, Respondent, v. ALLEN, Appellant.

June 10, 1876.

1. A. filed a plat dedicating to public use the streets shown thereon, so far as they were on his own land. He subsequently acquired that part of the land shown on the plat which belonged to others when the plat was filed, and thereafter returned for taxation so much of it as was not in the streets shown in the plat, describing it as bounded by these streets, and in such manner as to render his description unintelligible except by reference to this plat. *Held*, that this was evidence tending to show a dedication good on general legal principles.
2. (On application for an appeal.) On authority of *Haegele* v. *Mallinckrodt*, *held*, that the title to real estate is not involved in this action, and an appeal to the Supreme Court will not lie.

APPEAL from St. Louis Circuit Court.

Affirmed.

Horatio D. Wood, for appellant, cited: Gen. Stat., ch. 44, sec. 1; Ang. on Highw., sec. 134; Dill. on Mun. Corp., sec. 498; Holdane v. Trustees, etc., 21 N. Y. 479; Woodyer v. Hadden, 5 Taunt. 125; McLaughlin v. Stevens, 18 Ohio, 94; Becker v. City of St. Charles, 37 Mo. 13; Missouri Institute of the Blind v. How, 27 Mo. 211; Brinck v. Collier, 56 Mo. 160; Kelly v. City of Chicago, 48 Ill. 388; Irwin v. Dixon, 9 How. 30; Banaclough v. Johnson, 8 B. & Ad. 103; Lee v. Lake, 14 Mich. 12; Detroit v. Detroit & Milwaukee R. R. Co., 22 Mich. 209; Proctor v. City of Lewiston, 25 Ill. 153; Cape Girardeau & Bloomfield M. & G. R. Co. v. Renfroe, 58 Mo. 265; Wag. Stat. 1168, sec. 14;

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Fisher *v.* City of St. Louis, 44 Mo. 482; Rees *v.* City of Chicago, 38 Ill. 322; Hyde's Admr. *v.* Jamaica, 2 Dougl. (Mich.) 257, 285; 2 Greenl. on Ev., sec. 662; Parsons *v.* Trustees, etc., 44 Ga. 529.

R. E. Rombauer, for respondent, cited: Brown *v.* Manning, 6 Ohio, 298–303; Bitting *v.* Waterman's Appeal, 17 Pa. St. 211, 216; City of Cincinnati *v.* The Lessee of White, 6 Pet. 431; Wider *v.* City of St. Paul, 12 Minn. 192; Mankato *v.* Willard, 13 Minn. 13; Commonwealth *v.* Moltz, 10 Barr, 530; Alvord *v.* Ashley, 17 Ill. 363; Banks *v.* Ogden, 2 Wall. 57; Missouri Institute of the Blind *v.* How, 27 Mo. 211.

Gantt, P. J., delivered the opinion of the court.

We adopt in this case the statement made by Mr. Wood, of counsel for appellant, as follows:

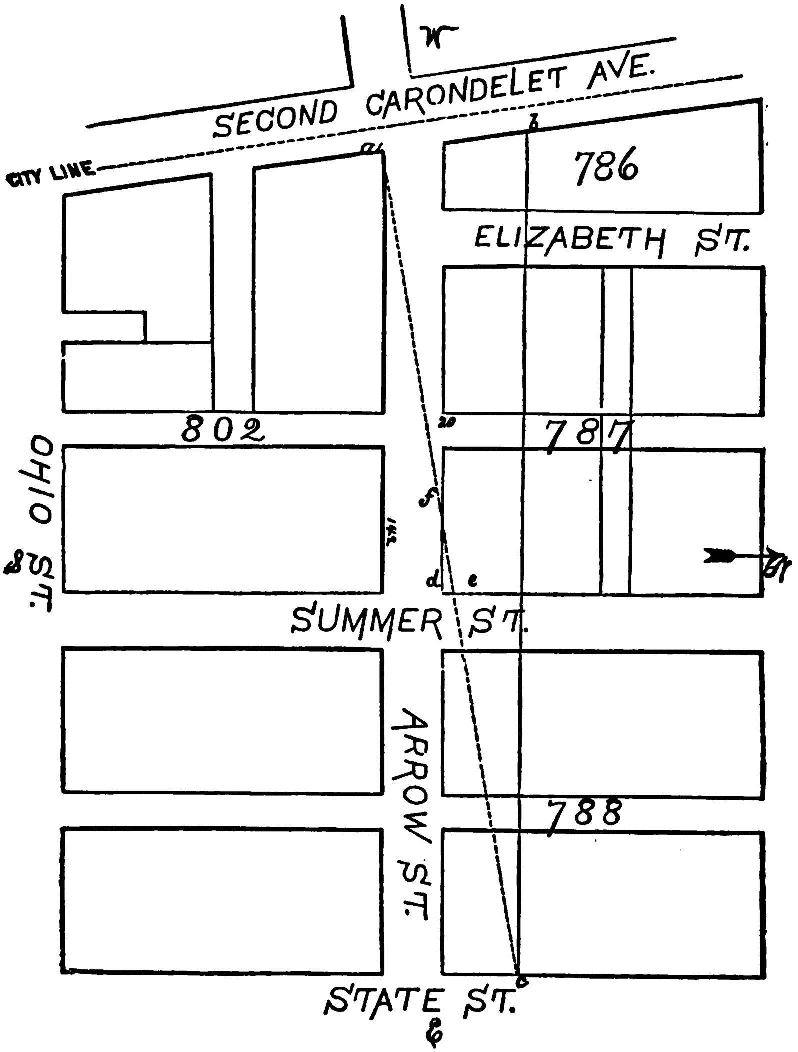
This is an action upon certain tax-bills issued for the construction of Arrow or Shenandoah street, from Summer street to Second Carondelet avenue.

The defense is that said portion of Arrow street was never condemned by the public authorities, or dedicated to public use.

The reply sets up that, anterior to the passage of the ordinance under which the work was done, a dedication of the street as a public highway had been made by appellant.

The case was tried upon the following agreed statement of facts, subject to the written objection of either party, as to the relevancy of any part of said agreed statement:

1. That the defendant had, long anterior to the filing of the plat hereinafter referred to, dedicated to public use that part of Arrow street on said plat which lies east of Summer street; that said dedication was to the width of sixty feet; that the exact location of said Arrow street, east of Summer street, is correctly shown on said plat, and that the lines—forming respectively the northern boundary of block 802 and the southern boundary of blocks 786 and 787, as shown on said plat—are a continuation respectively of the



[*a b c* represents triangular tract of land purchased on May 8, 1871, by appellant from Charless and McPheeters.]

southern and northern line of Arrow street, east of Summer street, and that Arrow and Shenandoah streets are one and the same street, known by different names.

2. That, on June 21, 1869, the defendant caused to be made and filed in the county recorder's office of St. Louis county a plat of his additions to the city of St. Louis, which was acknowledged by defendant in due form of law, and which had inscribed on it the following dedication:

"This plat is filed for the purpose of connecting in one plat all my additions heretofore made, lying between Carondelet avenue and Second Carondelet avenue, in the city of St. Louis, and also for the purpose of relinquishing to public use any and all streets and alleys, as indicated on the plat, which have not been *heretofore* relinquished on the property and addition represented.

"Witness my hand and seal this 21st day of June, 1869.

[Signed] "THOMAS ALLEN. [L. S.]"

3. That a copy of such parts of "said plat as plaintiff deems material to the issues" is below set out.

The letters *a b c* and *e f d* not being contained on the original plat, but inserted on this copy for the sake of reference. It being understood that the original plat may be given in evidence, and in case of any variance between the original plat and the copy of the part thereof herein inserted, such original plat shall govern.

4. That the line *a c* represents the line of a survey, and that the triangular tract of land inclosed within the points and lines *a b c* was, anterior and up to May 8, 1871, owned by other parties than the defendant; but that all land represented on said plat, and lying south of the line *a c*, as far as the same was not previously dedicated to public use, was, on June 21, 1869, owned by defendant.

5. That the defendant has at no time since the year 1864 returned for taxation any property lying between the line *a e* and the northern boundary line of block 802, as shown by said plat, with the exception of the small triangular tract

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bounded by the points and lines *e d f*, as shown on said plat, and that, in the tax returns made by his agents, and partly by himself, since 1864 up to 1873, he bounded his property, lying in the west half of block 802, on the north by Arrow street or Shenandoah street, and returned for taxation only the property owned in block 802, as bounded by the limits as said block, and that the most northern lot in the east half of block 802 fronts on Summer street.

6. That the defendant, in his tax returns made in September, 1871, and ever since, included only such parts of blocks 787 and 786 as are inclosed by the lines of said blocks, as shown on said plat—omitting all parts thereof covered by Summer street, Elizabeth street, and Arrow street, as such streets are shown on said plat, as well as the alleys running through block 787, and that no property was assessed to, or taxed against, defendant, since the year 1871, lying north of the line *a e*, excepting such as is inclosed within the boundaries of blocks 786, 787, and 788, as shown on said plat, exclusive of the alleys of said blocks.

7. Relates to the ordinance under which the work was done, passed on July 10, 1872.

8. Relates to the making of the contract, the doing of the work, and the receipt of the tax-bills sued upon.

9. That defendant is a resident of the city of St. Louis; that no notice was given to plaintiff by any one, until after the completion of the work, of defendant's claim; that said Arrow or Shenandoah street, between Summer street and Second Carondelet avenue, was not a public highway, but was defendant's private property.

10. The work and materials furnished by plaintiff were of uniform character and value along the entire length of said Arrow street, between Summer street and Second Carondelet avenue, as the city claims said street to be, and the lots of defendant, adjoining thereon, have been charged in said special tax-bills according to their frontage on said street as the city claims it.

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11. That the point "*f*," where the line *a e* intersects the southern boundary line of block 787 (as shown on the plat hereinabove stated), is nearer to the point of intersection of said southern line of the block with the eastern line of the alley next west than to the point of intersection of said southern line of the block with the west line of Summer street; and that more that one-half of the area of that part of Arrow or Shenandoah street as the city claims it, which lies directly north of block 802, lies south of the line *a e* (as shown on said plat).

12. That Arrow or Shenandoah street runs east and west, and Summer street north and south.

The following points are inserted in the agreed statement of facts on behalf of the defendant:

13. That neither the defendant, nor those under whom he claims the land occupied by that portion of the street in controversy, ever conveyed by deed to the city or county any portion of said street; and that no portion of said street has ever been condemned for public use.

14. That a ravine run across Arrow street, now called Shenandoah street, from north to south, at a point near Summer street, and that, anterior to the improvement of the street by plaintiff, it had never been used by the public as a highway, being impassable.

15. That no improvements were made upon said street, and no action was taken by the municipal authorities with reference to the improvement of said street, prior to the passage of the ordinance mentioned in plaintiff's petition.

16. That defendant was absent from the city, and had no knowledge that plaintiff was working upon the street and making the improvements sued for, until some time after the work was completed; nor had his agent any such knowledge.

17. That on May 8, 1871, Charlotte T. Charless, McPheeters, and others conveyed to the defendant the triangular-shaped tract of land included in the lines *a b c*, as

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shown in the plat embodied in the statement, a certified copy of which conveyance is hereunto attached and marked Exhibit "B."

18. That the triangular tract of land included within the lines *a b c*, as shown upon the plat embodied in the statement, and as also indicated upon the plat recorded in plat-book 8, page 74, filed on June 21, 1869, contains one and seventeen one-hundredths acres; and that prior to the purchase of the said tract by defendant, and until the year 1872, taxes were paid upon the whole of said tract, and said tract was assessed in acres.

19. That, by plat recorded in plat-book 1, record-book 1, page 16, and filed by defendant, Arrow street is dedicated from the west side of Summer street, eastwardly sixty feet wide, for a distance of 874 feet and three inches, to the eastern boundary line of defendant's land.

20. That the line *a c*, as shown on the plat embodied in the statement, intersects the line of the sidewalk as now constructed, lying north of block 802, at the northwest corner of said block.

21. It is admitted that the defendant would state under oath, and that he now states, that, when he filed the plat recorded in plat-book 8, page 74, a portion of which said plat is hereinbefore embodied in this statement, he represented Arrow street as extending from Summer street to Second Carondelet avenue, and across the one and seventeen one-hundredths acre tract, then belonging to Charless and McPheeters, for the purpose of showing how he desired to have said street dedicated at some future time.

22. That it is customary at the assessor's office to have the description of the property as returned correspond with the plats on file in that office; but parties may, if they desire so to do, return their property otherwise. That the returns for taxes, in 1872, of the property owned by Mr. Allen was made by his agent, Mr. Stephens, and, by an arrangement with one Robertson, a clerk in the assessor's

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office, said return was made so as to show the number of front feet on each boundary as indicated on plats of city blocks 786 and 787 on file in that office, and that in said returns said Stephens described the property in blocks 786 and 787, which defendant Allen had recently bought from Charless and McPheeters respectively, as property bounded by Arrow street, Second Carondelet avenue, and Elizabeth street; and Elizabeth street, Arrow street, and alley.

And thereupon in accordance with the stipulation in said agreement contained, the defendant filed his objections in writing, as follows:

The defendant, by counsel, objects to the following parts of the agreed statements of facts filed herein, which were inserted in said statement by plaintiff, for the reason that the same are irrelevant and immaterial, and prays the judgment of the court on such objections.

1. To point second, showing the plat filed by defendant on June 21, 1869, defendant not being then the owner.

2. To point fifth, showing the property returned by defendant for taxation, and the boundaries of the property.

3. To point sixth, showing the property the defendant has returned in blocks 786 and 787, and what he has omitted to return within the triangle *a b c*.

4. To point seventh, showing the ordinance under which the work was done (it appearing that the City Council had no power to pass said ordinance, the land not having been dedicated).

5. To point eighth, showing the tax-bills sued on, for the reasons specified in the foregoing objection ("4").

6. To point ninth, showing that the defendant is a citizen of St. Louis, and that plaintiff had no notice of his ownership.

7. To point eleventh, showing location of the point "*f*," and what portion of Arrow street lies south of the line *a e*.

Which objections were by the court overruled, to which ruling of the court the defendant then and there excepted.

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Thereupon the counsel for appellant insists that:

1. There was no statutory dedication of Shenandoah or Arrow street, west of Summer street. Gen. Stat., sec. 1, ch. 44; Ang. on Highw. 134; Dill. on Mun. Corp. 498; *Holdane* v. *Trustees, etc.*, 21 N. Y. 479; *Woodyer* et al. v. *Hadden*, 5 Taunt. 125; *McLaughlin* v. *Stevens*, 18 Ohio, 94.

2. Nor can a dedication at common law be claimed. See, besides cases above cited, *Becker* v. *City of St. Charles*, 37 Mo. 13; *Missouri Institute of the Blind* v. *How*, 27 Mo. 211; *Brinck* v. *Collier*, 56 Mo. 160; *Kelly* v. *City of Chicago*, 48 Ill. 388; *Irwin* v. *Dixon*, 9 How. 30; *Banaclough* v. *Johnson*, 8 B. & Ad. 103; *Lee* v. *Lake*, 14 Mich. 12; *City of Detroit* v. *Detroit & Milwaukee R. R. Co.*, 22 Mich. 209; *Proctor* v. *Lewis*, 25 Ill. 153.

3. The subsequent purchase by Mr. Allen of the triangular tract, containing one and seventeen one-hundredths acres, after filing the plat recorded in 1869, did not operate by way of estoppel, or otherwise, to dedicate the portion of the street north of the line *a c*.

4. There was no estoppel *in pais*. *Cape Girardeau & Bloomfield M. & G. R. Co.* v. *Renfroe*, 58 Mo. 265; *Fisher* v. *City of St. Louis*, 44 Mo. 482, and cases before cited.

5. Even though the acts of appellant manifested an unequivocal intention to dedicate his property to public use, yet, to constitute a dedication, acceptance by the public must be shown. *Becker* v. *City of St. Charles*, 37 Mo. 13; *Brinck* v. *Collier*, 56 Mo. 161; *Rees* v. *City of Chicago*, 38 Ill. 322; *Lee* v. *Lake*, 14 Mich. 12; *Parsons* v. *Trustees, etc.*, 44 Ga. 529; *Hyde's Admr.* v. *Jamaica*, 2 Dougl. (Mich.) 257; 2 Greenl. on Ev. 662, and cases before cited.

On the other hand, the counsel for respondent submits that the judgment of the Circuit Court was warranted by the evidence of, first, the dedication of Arrow or Shenandoah street shown by the plat filed in 1869; second, the facts under which an estoppel *in pais* is irresistibly inferred against Allen.

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It is obvious that, if respondent's position be maintainable, the judgment must stand, and the examination will be simplified by devoting our attention first to these two propositions:

1. Was there a dedication of Arrow street by the plat filed in 1869? That is to say, did Mr. Allen, by filing that plat, dedicate land not then belonging to, but subsequently acquired by, him?

As to the land belonging to him at the time, he certainly manifested by all modes possible for him his intention and purpose that Arrow street, as there delineated, should be a public highway. On June 21, 1869, he acknowledged the plat of his addition. The object of this act was declared to be twofold: First, it had in view the connecting in one plat of all the additions theretofore made by appellant of land between First and Second Carondelet avenues; and, second, to relinquish to public use any and all streets and alleys, as indicated on the plat, not previously relinquished.

Unless the apparent purpose of relinquishing to the public at once, and as of the date of June 21, 1869, so much of Arrow street, west of Summer street, as belonged to him be controlled by some rule of interpretation which we are not at liberty to disregard, we should be of opinion that to this extent, at least, there was a dedication of Arrow street as of that day. No such rule has been pointed out. The cases cited by appellant's counsel, in support of the theory of the existence of such a rule, we cannot accept as demonstrating it. These cases are *Woodyer* et al. v. *Hadden*, 5 Taunt. 125; *Holdane* v. *Trustees, etc.*, 21 N. Y. 479.

In the first of these cases the question of fact, whether there had been a dedication of land to public use, was referred to a jury, which found the fact to be that no such dedication had been made. This verdict the Court of Common Pleas refused to disturb. There were circumstances in the case which negatived intention to dedicate a piece of

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land as a public street. The only permitted use of it had been by those who owned the land through which it was laid out; and it scrupulously stopped at the line of defendant's land. In the language of Sir James Mansfield, Ch. J., it was a "*cul de sac.*" This decision cannot be relied on for the proposition asserted by appellant.

In the case in 21 N. Y., also, the question was of the effect of certain acts of the proprietor to work a dedication of a piece of land to public use. If it were so dedicated at all, it was dedicated as a *street*, and it was not a street, but a *cul de sac.* The matter of fact was tried by a referee, who found that the land in question communicated with a public road at one end and was closed at the other, and that there could be no presumption of the dedication of a *cul de sac* as a highway.

In both these cases there was no such thing as a statutory dedication. The question was whether there had been a dedication good at common law.

The counsel for appellant also cites the case of *McLaughlin* v. *Stevens*, 18 Ohio, 94, 97. We do not see that he is aided by this decision. There the plat of the town of Wellsville showed a street, called Water street, sixty-six feet in width. The actual distance of the northern line of Water street from the Ohio river was more than 200 feet. The southern line was nearly 150 feet from the river; but the defendant's case depended upon the extension of Water street to the river, by reason of the dedication operated by the plat of the town made by Wells.

The court was of opinion that, if only the northern line of Water street had been shown by the plat, and no line for the southern boundary had been laid down between the northern line and the river-bank, there would have been much force in the argument; but, as matters stood, the plat was decisive of the controversy, negativing, as it did, any presumption of an intention to extend Water street beyond

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the southern line of it indicated on the plat, and at a distance of sixty-six feet from its northern line.

We are, therefore, of opinion that, to the extent of the ownership of Allen, Arrow street was dedicated to public use by the plat filed June 21, 1869. If, instead of the line dividing his land from the northern proprietor being oblique to the lines of Arrow street, it had been parallel with, and intermediate between, its north and south lines, no one, we imagine, would have been at liberty to doubt that he thereby declared that, so far as he possessed the power, he relinquished to the use of the public all the land between the north and south lines of Arrow street, the east line of Second Carondelet avenue, and the west line of Carondelet avenue. We think the circumstance of the obliquity of the line of division in no respect changes the character of the act. If any inference is to be drawn from the designation of that line on the plat, we think that its being a dotted, and not a full, line was evincive of Mr. Allen's view that it was, at most, only a temporary obstruction to a street, the complete establishment and opening of which he regarded as very important to the desirableness of his addition.

2. If, in 1869, Mr. Allen had held the inchoate title to the land purchased by him in May, 1871, from Charless and McPheeters, we should have no difficulty in coming to the conclusion that he contemplated then, and declared his intention, to dedicate that also to public use. But no case to which we have been referred—not even that of *City of Cincinnati* v. *White*, 6 Pet. 431 and following—goes so far as to say that an intention, however unequivocally expressed, respecting the public use of a tract, M, of which A is the proprietor, shall conclude him in respect of an adjoining tract, W, which at that time is held by a stranger, but which he subsequently acquires. Something more than subsequent acquisition will be needed to conclude A. No doubt what he has previously said or done, if not qualified

or retracted, will be remembered against him, and will be properly construed as being repeated or ratified by him, when the change of circumstances occurs which gives him power of disposition over the tract N. We will not dwell on this consideration, for it must be plain that if Mr. Allen had declared in his dedication of 1869 his intention of acquiring the tract *a b c*, and thus confirming his plat—which would, perhaps, have been the most forcible and unequivocal mode of committing himself by the subsequent acquisition—he could hardly be heard, after acquiring the triangular piece of land and permitting any appreciable interval of silence to elapse, to deny the dedication of the street as indicated by the old plat. It is not meant that he did any such unequivocal act, or said any such unequivocal words, but we think he did what had a tendency, more or less strong, to indicate this intention; the Circuit Court has found that he did so intend, and, if we are correct in thinking that such was the tendency of what he did, the judgment of the Circuit Court must stand.

We have said that we consider his conduct as leading to the conclusion that he did so intend; and, indeed, we do not think it capable of any other interpretation. He had an interest in making that part of the indicated course of Ann street lying north of the line *a f* a public highway. To make it such, connected his addition with Second Carondelet avenue, and brought into market the northern tier of lots in block 802, while it also naturally tended to increase the value of the lots to the east of Summer street. But there was another reason why it was advantageous to him to have this portion of Arrow street not regarded as private property, and that was the wish to escape taxation. It is true that the value of that part of the triangular piece *a b c* which lies north of the north line of Arrow street would probably be much increased by the complete opening of the street, and thus the burden of taxation would be increased, instead of lessened; but, forasmuch as a proprietor gains more by increasing the value of his land than he loses by

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the increased consequent taxation, we do not consider that the argument last suggested is impaired. We consider it undeniable that a proprietor laying off his land into an addition to the city desires to promote its salability; and it is plainly his interest to diminish, as far as can be honestly done, the burdens of taxation upon it. Looking, then, to what Mr. Allen did in respect of this property after May 8, 1871, we find that he has not only *not claimed*, but has positively *disclaimed*, ownership over any part of Arrow street since 1871. At the lowest, this evidence tends to the conclusion that Mr. Allen intended and desired to be understood, not only by possible purchasers of lots in his addition, but by the State, city, and county, that Arrow street was relinquished to the public as a highway after his acquisition of the triangular piece of land *a b c*, which enabled him to give effect to the intention previously declared.

In the case of *Gamble* v. *City of St. Louis*, 12 Mo. 617, the Supreme Court of Missouri considered acts of somewhat similar nature to be conclusive evidence of a dedication to public use. There have been many decisions to the same effect since. In the most of these cases the continued use of the property according to the dedication has been a controlling element, but it is not a necessary one if the owner has done what is wholly inconsistent with the supposition that the property is still the subject of private ownership—if, in short, he has profited by inducing others to accept as true the hypothesis which he now desires to disprove, but by the disproof of which they would be damnified.

All the judges concurring, the judgment of the Circuit Court is affirmed.

Gantt, P. J., delivered the opinion of the court, on application for an appeal to the Supreme Court.

This application is made on the ground that the title to real estate is involved in the case. The Constitution, (sec. 12, Art. 6), gives an appeal to the Supreme Court "in

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cases involving title to real estate;" and whether this case comes within the designated class is the question presented for our determination.

The counsel for appellant argues earnestly and ingeniously in favor of the affirmative of this question; but the counsel for respondent refers us to a ruling of the Supreme Court upon the matter which seems decisive. In the case of *Haegele* v. *Mallinckrodt* an appeal was taken in December, 1873, from a judgment of the St. Louis Circuit Court at general term. The record was lodged in the office of the clerk of the Supreme Court on February 28, 1874. On January 4, 1876, a motion was filed asking the Supreme Court to transfer the cause to the Court of Appeals, under section 19 of Article 6 of the Constitution of Missouri, which provides that "all cases pending in the Supreme Court, at the time of the adoption of this Constitution, which, by its terms, would come within the final appellate jurisdiction of the St. Louis Court of Appeals," shall be transferred to, and determined by, the St. Louis Court of Appeals. On January 18, 1876, the Supreme Court made the order prayed for—thus deciding that, in the case of *Haegele* v. *Mallinckrodt*, the St. Louis Court of Appeals had final jurisdiction. If, in that case, which has not yet been heard, either party should pray an appeal from our decision to the Supreme Court of Missouri, we should, if we granted it, be directly in conflict with the Supreme Court; and this, of course, is a position we are not warranted in taking, and which we will be careful not to occupy. But we cannot distinguish between the nature of the case at bar and that of *Haegele* v. *Mallinckrodt*. In each case the action is on a special tax-bill; in each case the question is whether the spot on which the work sued for was done had been dedicated as a public street. The Supreme Court has held that this court has final jurisdiction of one of these cases—that is to say, that no appeal lies to the Supreme Court from such judgment as we may render in the cause.

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And, carefully abstaining from all examination for ourselves of the question presented by the application, we conform to the views expressed by the Supreme Court of Missouri.

All the judges concurring, the motion fo an appeal is overruled.

SOCRATES NEWMAN, Respondent, *v.* ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY, Appellant.

June 10, 1876.

Where a trespass has been willfully committed, and persisted in after earnest remonstrance, with circumstances of aggravation, it is not error to instruct the jury that they are at liberty to give exemplary damages.

APPEAL from St. Louis Circuit Court.

Affirmed, with 10 per cent. damages.

Thoroughman & Warren, for appellants, cited: Shear. & Redf. on Neg. 656; Miller *v.* St. Louis & Iron Mountain R. R. Co., 31 Mo. 262; Buckley *v.* Knapp, 48 Mo. 152; Franz *v.* Hilterbrand, 45 Mo. 122; Conrad *v.* Pacific Ins. Co., 6 Pet. 268; McKenn *v.* Citizens' Ry. Co., 42 Mo. 87; Fisher *v.* Goebel, 40 Mo. 475; Waters *v.* Brown, 44 Mo. 302; Sedgw. on Dam., title Exemplary Damages, Appendix No. 1, p. 609 *et seq.;* Goetz *v.* Ambs, 27 Mo. 28; Green *v.* Craig, 47 Mo. 90.

Farish & Griffin, for respondent.

GANTT, P. J., delivered the opinion of the court.

The action in this case was brought in May, 1872. It was tried in the Circuit Court in January, 1875. The petition charged an aggravated and most lawless and malicious trespass upon the land of plaintiff, occupied by him and his family at the time as a residence; the violent, forcible invasion on Sunday morning of his premises, the doing of very great damage to the property, the terrifying and dis-

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turbance, and the endangering of the lives, of himself and his family, by blasting with gunpowder, throwing down and disfiguring valuable property. He laid his damages at $20,000. The answer of defendant consisted in a denial of each particular outrage stated in the petition.

The jury before which the cause was tried found for the plaintiff, and awarded to him $3,000 as damages, of which they declared $1,500 to be for compensation for injury done to the property, and $1,500 as exemplary damages.

The testimony fully sustained the allegations of the petition. The plaintiff had occupied his residence, on the yard of which the trespass had been committed, for nearly twenty years. His family consisted of himself, his wife, her mother, and seven children—the youngest of whom was two years old, and the oldest eighteen. Mrs. Newman was at the time in delicate health. Without warning, without any attempt to obtain by permission of the proprietor, or by legal proceedings, the right to enter upon his land and remove a part of an impending rock above the track of the railroad, a party of men employed by the defendant, and "imported" from below to do the job, perpetrated on the morning of Sunday, in the month of May, 1872, the outrage complained of. Their number was six or seven. They had on the Saturday, and perhaps on the Friday, previous, prepared for the work, by drilling holes in the rock to receive the charge of powder. When remonstrated with by Mr. Newman, they replied by threatening to take him to the calaboose. When he thereupon sought the assistance of the police, he was told by these guardians of public order that they would arrest him if he attempted to stop the work of the trespassers, who were invading and destroying his property; and, on Sunday morning, he was awaked by the noise of the blast by which the rock was blown to pieces. Several other blasts followed in the course of the day. The work of drilling holes and putting

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in charges of powder went on in the face of all the protests which he could make—and he seems to have protested earnestly, but fruitlessly, against the wrong—but no assistance was rendered him by the police, and, for the greater part of the day, the premises of the plaintiff were the scene of disturbance, violence, tumult, and danger. The fragments of the rock burst by the blasting flew in various directions, and the beauty of the lot of plaintiff, and its value as a building site, were materially impaired by the work of the invading party.

At the instance of the plaintiff the court instructed the jury that, "if the defendant entered upon premises actually in possession of plaintiff, and, by blasting rock thereon, did the injuries complained of in plaintiff's petition," they must find for plaintiff.

2. "That if the injury complained of was the blasting away of an overhanging mass of rock suitable for an out-look, and if the surface of it was inclosed so as to form part of plaintiff's homestead and premises, then the same was in the exclusive possession of plaintiff, although defendant was in possession of a railroad track directly below."

3. "That, if they find for plaintiff, they will assess his damages at such sum as will compensate him for the injury done to his possession by reason of blasting off the said projecting rock; and the fact that the defendant persisted in blasting said rock against the earnest protestations of plaintiff will *not* be taken into consideration by the jury in assessing plaintiff's damages."

4. "If, however, the jury find for plaintiff, and believe that the defendant, its servants and agents, in blasting off said rock, were guilty of gross negligence and recklessness, and a disregard for the safety, peace, health, and comfort of plaintiff and his family, the jury may, in addition to compensation, allow also exemplary damages."

5. "Exemplary damages are damages over and above the

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loss sustained, and are intended for the double purpose of punishing the defendant and as an example to retain [*Q.* restrain?] others from a like violation of law."

To the giving of these instructions defendant excepted.

The defendant asked, and the court gave, the following instructions:

1. "If, at the time of the happening of the injury complained of, and from then to the institution of this suit, defendant was in the actual possession and occupancy upon which it is alleged the defendant trespassed, claiming the same adversely to the plaintiff, the court instructs the jury that, in respect to the parts so possessed and occupied by defendant, plaintiff cannot recover in the action for any entry or trespass on the same, whether the part so possessed or occupied was in a public street or on the premises of plaintiff."

2. "It being admitted by the parties to this suit that, at the time of filing in the recorder's office the map called 'Eiler's map,' put in evidence by the plaintiff, the town of Carondelet was the owner of the land represented on said map of which the premises in dispute are part, the court instructs the jury that the filing of said map had the effect, in law, of dedicating to public use, for the purpose of a street, all of the ground represented on said map as 'A Tow, or Water street.'"

3. "The court instructs the jury that, although the plaintiff, at the time of the injury complained of, was in the actual possession of the projecting rock spoken of by witnesses, yet, if said rock was outside of said block 5, and within the street or way called or designated as 'a Tow, or Water street,' on Eiler's map, put in evidence, the plaintiff is not entitled to recover anything on account of the diminution of the permanent value of the plaintiff's premises occasioned by the removal of said rock by defendant."

And refused to instruct as follows:

"That, in case the jury find for the plaintiff in respect to the entry and removal of the projecting rock spoken of by

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the witnesses, they should assess his damages on that score at such sum as the evidence shows will fairly compensate him for the actual loss and injury sustained by him by reason of such entry and trespass; but, under the evidence in the case, the jury are not warranted in giving the plaintiff vindictive damages, or damages by way of punishment."

To the refusal of this the defendant excepted.

1. We have before us the record of a case well calculated to arrest our attention and excite our surprise. We are quite aware of the necessarily imperfect picture which such a representation gives of what was shown by the evidence of living witnesses at the trial. We are admonished, by what is shown by this transcript, to make full allowance for this imperfection. We should otherwise be unable to understand how, in St. Louis, in the year 1872, a trespass so ruffianly and monstrous could have proceeded to its consummation on the third day (and *that* day *Sunday*), in the face of remonstrances by the proprietor of the premises invaded, and without opposition—almost with the aid—of the police; and a difficulty of equal magnitude would be encountered if we attempted, by the light of anything in this record, to justify the exaction by the Circuit Court of a remitting of the sum of $1,000 as the condition of overruling the motion for a new trial. Of course the Circuit Court *was* thus justified by something not appearing to us—something to be gathered from the events of the trial, but not capable of being preserved in the report of it. But—the only point pressed with any earnestness, by the counsel for appellant, being the refusal of the trial court to instruct the jury that this was not a case for punitive or exemplary damages—we cannot avoid saying that we are of opinion that it is precisely such a case as would justify any amount of exemplary damages within the limit of the claim made by the petition. We have not often heard of a trespass more inexcusable, better calculated to lead to a breach of the peace, and more discreditable to all who promoted it. The ignorant instruments of its perpetration, though perhaps

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guilty of a breach of the criminal law, are less to be blamed than those by whose direction and authority they acted.

We do not consider that the question whether, under the circumstances disclosed, exemplary damages could be given by the jury is deserving of a serious answer. No court has been more careful than the Supreme Court of the United States in protecting corporations, where charged with negligence, against verdicts dictated by passion or prejudice. In the case of the *Milwaukee & St. Paul Railway Company* v. *Arms*, decided at the October term 1875 (reported at p. 220, and following, of the Central Law Journal, vol. 3, No. 14, April 7, 1876), that tribunal reversed a judgment in which exemplary damages had been awarded against the company, without any such misconduct on its part as in the opinion of the court justified their infliction. Mr. Justice Davis, delivering the opinion of the court, declares that the absence of the care necessary on the part of the employees of the company to prevent the occurrence of the disaster, whether it be called gross or ordinary negligence, "did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury inflicted. *To do this there must have been some willful misconduct, or the entire want of care which would raise the presumption of a conscious indifference to consequences.*" No one, we think, can doubt that the Supreme Court of the United States would have considered the case before us as not only permitting, but calling for, the most exemplary damages. It is unnecessary to add that the Supreme Court of Missouri has, in similar cases, laid down the same rule. *Kennedy* v. *North Missouri R. R. Co.*, 36 Mo. 351; *Green* v. *Craig*, 47 Mo. 90; *Malecek* v. *Tower Grove R. R. Co.*, 57 Mo. 17. The case last cited should have prevented the prosecution of the appeal in this case; and the judgment, with the concurrence of Judge LEWIS—Judge BAKEWELL, having been of counsel, not sitting—is affirmed, with 10 per cent. damages.

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Anna Moser, Appellant, *v.* Phœnix Mutual Life Insurance Company, of Hartford, Connecticut, Respondent.

June 10, 1876.

1. Affirming *Russum* v. *St. Louis Mutual Life Insurance Company*, *supra.*
2. Courts of justice cannot relieve parties from the consequences of their own neglect to perform the contract which they seek to enforce against others.

Appeal from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant, cited: St. Louis Mutual Life Ins. Co. *v.* Grigsby, 4 Big. 633; Dutcher *v.* Brooklyn Life Ins. Co., 4 Big. 665; Ohde, Admr., *v.* Northwestern Life Ins. Co., 2 C. L. J. 567; 8 C. L. J. Feb. 19th, 123; C. L. J. Oct. 15, 1875, vol. 2, 666; Ins. L. J. Feb. 1876, 149.

Frank Eno, for respondent, cited: Marsh *v.* Richards, 29 Mo. 99; Worthington *v.* Charter Oak Life Ins. Co., 41 Conn. 373; Pitt *v.* Berkshire Life Ins. Co., 100 Mass. 500; Patch *v.* Phœnix Life Ins. Co., *supra;* Robert *v.* Northeastern Mutual Life Ins. Co., 2 Disney, 106.

Gantt, P. J., delivered the opinion of the court.

The petition in this case was filed to the December term, 1874, of the St. Louis Circuit Court, and stated that the defendant was a corporation, etc., and that by its policy No. 65,126, dated July 13, 1872, it assured the life of Joseph G. Moser, for the benefit of his wife, the plaintiff, in the sum of $800, payable ninety days after notice of loss; that Moser died in September, 1874; that defendant had due notice thereof, but refused to pay, etc.

The defendant admitted the execution of policy 65,126, but denied its liability thereunder, alleging that by its terms the promise to pay was conditioned upon "the annual payment of interest on four notes on or before July 13th in every year during the continuance of the policy;" that said four notes had been given by Moser for part of the premium

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on a former policy held by Moser in defendant's office, in lieu of which said former policy the "paid-up" policy sued on had been issued; that the terms of the former policy applied to the present; that the former was an endowment policy, and provided for the issue of a paid-up policy, part of the consideration of which was to be the premium paid on such former policy; that one of the stipulations of the former policy was that, on the issue of a paid-up policy, the assured should not be subject to any subsequent charge except the interest annually in advance on all premium notes unpaid on said former policy; that said four notes were for part of the premium unpaid on said former policy; that defendant, instead of requiring that they should be immediately paid, issued the last policy for the consideration therein expressed of $450.80, which was not actually paid in cash, but was the amount which had been paid in cash and notes on the former policy; and the further consideration of the annual payment in advance of the interest on said four notes, which was, by a memorandum on the margin, declared to be $15.36, and that it was part of the conditions of the last policy that, in case the interest should not be paid annually in advance on said four notes, the policy should be null and void, and all former payments should be forfeited to the defendant; that J. G. Moser did not, nor did any one for him, fulfill these conditions; that the interest due July 13, 1873, was not paid, nor was that due in July, 1874. There was also an answer by way of recoupment, which need not be dwelt on.

The reply denied all knowledge of the notes alleged in the answer; denied that the policy sued on was subject to the stipulations contained in the first policy, and denied the legal effect of the latter policy as claimed by defendant. She also denied the set-off or recoupment.

At the trial in April, 1875, plaintiff became nonsuit, moved to set the nonsuit aside, and appealed to the general term and to this court. By the bill of exceptions it

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appeared that the plaintiff put in evidence the policy sued on, No. 65,126, whereby the defendant, in consideration of the representations made, and the sum of $450.80 paid by Anna Moser, and of the annual payment of interest on four notes on or before July 13th in each year during the continuance of the policy, did assure the life of J. G. Moser, for the benefit of Anna Moser, in the sum of $800, for the term of his natural life. The policy was declared to be subject to several conditions, among which was that, in case any note given for the cash part of premium on this policy should not be paid at maturity, or in case the interest is not paid annually in advance on any notes which may be given for any portion of the premiums on this policy, then, and in every such case, the policy shall be null and void; (2) if the said interest shall not be paid at the office of the company, in the city of Hartford, Connecticut, or to an agent of the company, on his producing a receipt signed by the president or secretary, on or before the date above mentioned, then the company shall not be liable in any such case for the payment of the sum insured, etc.; and, in every case where this policy shall determine or become null and void, all payment made thereon shall be forfeited to the company. This policy was dated July 13, 1872. The plaintiff also put in evidence policy 28,837, dated July 25, 1868, by which defendant assured the life of J. G. Moser, in favor of the plaintiff, for the term of life, in the sum of $2,000, in consideration of the representations contained, viz.: The sum of $128.80 paid, and a like sum to be paid on or before July 25th in each year during the continuance of the policy, or until ten annual payments should be made. It was further provided that, when two or more annual premiums should be paid, the assured might exchange the policy for as many tenths of $2,000 as there had been annual premiums paid, without subjecting the assured to any further charge except the interest annually in advance on all premium notes unpaid on this policy.

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It appeared by the evidence of the president of defendant that the policy sued on was issued in place of policy No. 28,837, after four payments had been made by cash or notes. Four notes were given to the company, dated respectively July 25, 1868, July 25, 1869, July 25, 1870, and July 25, 1871. Shortly before the next premium fell due the assured commuted the policy for a paid-up policy of $800, on which but one payment had been made, which was made on the date of its issue, and amounted to $15.36. On the notes above mentioned there was due to the company on February 24, 1875, the sum of $256 principal money and $30.72 interest, less a dividend of $11. The interest due on the four notes in 1873 and 1874 had not been paid.

The notes given were of the following form:

"$64. *Hartford, July 25, 1869.*

"Twelve months after date, for value received, I promise to pay the Phœnix Mutual Life Insurance Company, or order, sixty-four dollars, with interest payable annually in advance, at 6 per cent., it being for part premium due and payable on policy 28,837 of said company, on the life of J. G. Moser, dated July 25, 1868, which policy, and all payments or profits which may become due thereon, are hereby pledged and hypothecated to said company for the payment of said note. "JOSEPH G. MOSER."

Upon this evidence the court instructed the jury:

1. "That upon the whole case the plaintiff could not recover."

2. "That the payment of interest on the four notes annually in advance was a condition precedent to the fulfillment by defendant of the contract in suit, and, unless it appeared that said interest has been paid, the policy was void."

Whereupon the plaintiff, excepting to the giving of the instructions, became nonsuit, saved her exceptions, and appealed.

1. We are unable to distinguish this case from that of

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Russum v. *St. Louis Life Insurance Company*, decided at the January term of this Court. We then, in substance, said, and we now repeat, that we cannot relieve parties from the consequences of their own neglect, however we may sympathize with them in the attendant loss. Nothing is plainer than that when, *e. g.*, two annual premiums had been paid on the original policy, the company would have received two times $128.80, and the assured would then have been at liberty to change the policy for a paid-up policy for $400, or as many tenths of $2,000 as he had paid annual premiums. He actually made the change when, by notes and cash, he had paid four annual premiums, and received a "paid-up" policy for four-tenths of the original amount of insurance contemplated, *i. e.*, $800. But, though this was called a "paid-up" policy, it was only "paid up" *sub modo*. For one-half of the annual premium, notes of practically indefinite credit were given, subject only to the annual payment in advance of interest at the rate of 6 per cent. That this was an accommodation to the assured cannot be doubted. If he had chosen to pay the past annual premiums in cash, as he was of course at liberty to do, he would have had a policy exempt from all chances except that of the insolvency of the company. When he availed himself of the credit offered by the company, he of course did so on the terms coupled with the offer, and expressly accepted by him. If he had, on July 25, 1872, paid four times $128.80, or $515.20, in cash, receiving in return a really paid-up policy for $800, payable on his death, every one can see that the company would be a loser, unless a sufficient time elasped after the issue of the policy and before his death to allow the net accumulations of profits from the investment of the money received to become at least equal to $284.80. If any part of the whole sum of $515.20, instead of being paid in cash, were left in the hands of the assured at 6 per cent. interest, and the assured were

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at liberty to choose his own time and consult his own convenience for the payment of that interest, it is obvious that the company is at his mercy. It is vital to it to guard against such conduct; it proposes a contract, the terms of which are favorable to the assured, and eminently reasonable; it secures the performance of this very reasonable contract by the exaction of conditions the very rigor of which is calculated to arrest the attention and secure their punctual performance; and, when such a contract has been made by the parties, either of them must appeal in vain to a Court of law for relief from its consequences. As we had occasion to remark in the case of *Russum* v. *St. Louis Life Insurance Company*, to declare the provisions inserted into the contract for the protection of the insurance company to be merely clauses intended to act *in terrorem*, to quicken the diligence of the assured, but not to be construed to forfeit his interest in the policy, would be the creation of a contract which the parties had not made, and the discharge without consideration of a contract into which they had solemnly entered. Courts sit for no such purpose.

All the judges concurring, the judgment of the Circuit Court is affirmed.

STATE OF MISSOURI, to use of A. KLEINSORGE, Administrator, etc., Respondent, *v.* HERMAN MEYER *et al.*, Appellants.

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163a	281
163a	290
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June 10, 1876.

1. A notary public who falsely certifies that he is personally acquainted with the grantor in a deed, whom he does not know, and who is personated by another, is liable to all persons damaged by such false certificate.
2. In an action for damages for such a false certificate, it will not avail anything for the notary to say he was not aware of its falsity, or that he believed it to be true. It is his duty to know it to be true.
3. It is not error to refuse to instruct the jury, where there have been no facts proved to which the instruction asked could apply.

4. Advantage cannot be taken in an appellate court of an informality or defect in a pleading to which no objection was made in the trial court.

APPEAL from St. Louis Circuit Court.

Affirmed.

Davis & Smith, for appellants.

Farrish & Griffin, for respondent, cited: Shear. & Redf. on Neg., sec. 423.

GANTT, P. J., delivered the opinion of the court.

This suit was brought to the April term, 1872, of the St. Louis Circuit Court, against Meyer and his sureties, on his bond as notary. This bond was dated April, 1869, and was conditioned for the faithful performance of the duties of the office of notary. The petition alleged that, prior to April 27, 1869, Herman Kleinsorge placed in the hands of Kleinschmidts, two of defendants, $1,500, to be lent for him upon good and sufficient real estate security in the city of St. Louis; that a person personating William Shultz represented himself to Kleinschmidts as the owner of certain real estate in St. Louis; that thereupon the title was examined, ascertained to be in William Shultz, a deed of trust was prepared by Kleinschmidts, as agents of Kleinsorge, and the person personating Shultz executed and acknowledged the same before Meyer, who certified that he was personally acquainted with William Shultz, and that he had acknowledged the deed was his. Then Kleinsorge took the deed, and paid to the imposter $1,500. That, at the date of this transaction, William Shultz was in fact the owner of the property described in the deed of trust; that he was a well-known person, residing with his family on the property supposed to be incumbered by the deed; that he never executed this deed, nor authorized its execution; that Meyer negligently certified to a false state of facts, whereby Kleinsorge was damnified, and judgment was prayed against Meyer and his sureties accordingly. The answer of the Kleinschmidts (Meyer not being served) admitted that Meyer was appointed notary, and that they executed the

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bond set out in the petition, and proceeded to deny every other allegation of the petition. There was a trial in February, 1875, whereat plaintiff had a verdict and judgment for $1,762.50, and, after motion to set the verdict aside, an appeal was taken to the general term, and thence to this court. By the bill of exceptions it appeared that a fraud had been practiced by some one personating William Shultz; that this person had, in the name of Shultz, called upon Kleinschmidts, had gone with them to show the property, had spoken to a person there whom he called "aunt," and had successfully imposed himself upon both Meyer and the Kleinschmidts as the veritable William Shultz, and owner of the land. This person appears to have been a young man about twenty years of age. He seems to have introduced himself to the defendants, and they appear to have received his assurances of his personality with very credulous faith, without any suspicion, and without any inquiry becoming a prudent man. Thus acting, Kleinschmidts put out the money of Kleinsorge, and Meyer took the acknowledgment of the rogue, and made his certificate. The money of Kleinsorge was lost by reason of the want of care exercised by Meyer. Others, also, may have been guilty of contributory negligence; but, if the careless act done by Meyer was necessary to the accomplishment of the loss, there can be little doubt that, in a proper form of action, he alone may be made answerable for the resulting damages—leaving aside all questions of the adjustment of the burden among the several parties who shared in the work of negligence to be settled in another proceeding. In this case the action is brought against Meyer alone—that is, he alone is charged as the guilty party—though his sureties are sued along with him, the joining of them with him is not due to the fact that they, together with him, were guilty of negligence, but that they, as his sureties, undertook that he would be diligent and faithful in the performance of his duties as notary.

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When the evidence (which, at lowest, tended to prove the statements of the petition) was put in, the court instructed the jury:

1. "That, if they believed from the evidence that the person who signed the deed of trust read in evidence was not William Shultz, and was not personally known to the defendant Meyer to be William Shultz, or proven to be so by the sworn testimony of two witnesses, and that the defendant Meyer took the acknowledgment of said person without personal knowledge as to his identity, or without having such identity established by the sworn testimony of two witnesses, and that, by reason of such action on the part of said defendant Meyer in taking said acknowledgment, the person falsely representing himself to be William Shultz obtained the sum of $1,500 from Herman Kleinsorge, and that, in consequence thereof, the said sum became lost to said Kleinsorge—then, if the jury further believe, etc., they will find for the plaintiff. But the loan from Kleinschmidts to the person representing himself to be William Shultz must have been made in consequence of, and through reliance upon, the certificate of the defendant Meyer as to the identity of such person. Hence, if the jury believe that the agent of Kleinsorge instructed the defendant Meyer to deliver the money to the person representing himself to be William Shultz, and did so—but in consequence of his belief that said person was Shultz, based upon the supposed correction [*sic*] of the defendant's certificate, but by reason of his having become satisfied as to said identity from evidence or information other than such certificate, then the jury will find for the defendant."

The defendant excepted to this instruction, and asked the following, which the court refused, defendants excepting:

1. "That, upon the evidence introduced by the plaintiff, the plaintiff cannot recover."

2. "If the jury believe from the evidence that the defendant Herman Meyer, at the time he executed the certificate

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of acknowledgment to the deed of trust in evidence, had reasonable cause to believe, and did believe, that the facts certified by him in said certificate to be [*sic*] true, then the plaintiff cannot recover, although they may find that all the facts so certified to are not true."

3. "If the jury believe, etc., that Theodore Kleinschmidt was the agent of Herman Kleinsorge in making the loan, secured by the deed of trust from William Shultz to Kleinsorge's trustee, filed for record April 27, 1869, and that said Theodore Kleinschmidt directed said Meyer to loan said money so secured by said deed of trust to the person who signed said deed of trust, and take his deed of trust on the property therein described therefor, then the plaintiff cannot recover in this action."

4. "If the jury believe from the evidence that Herman Meyer, at the time he certified to the acknowledgment in question, honestly believed that he knew the facts certified to in said certificate, and that said facts were true, then the plaintiff cannot recover in this action."

5. "If the jury believe from the evidence that, when the defendant Herman Meyer took the acknowledgment of the deed of trust in evidence, he in good faith believed he knew the person signing said deed to be William Shultz, the person who executed said deed, and who owned the property therein described, then the plaintiff cannot recover."

6. "The defendant asks the court to instruct the jury that the plaintiff cannot recover in this action unless they find that the defendant Herman Meyer, at the time he took the acknowledgment to the deed of trust, negligently and maliciously certified to the identity of the person executing the same, with intent to defraud the plaintiff."

There were some facts in relation to the transaction that should be stated, with a view to the understanding of the question arising on this record.

The young man who personated William Schultz is

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declared, by Mrs. Shultz, to have been twenty years of age in 1867, or twenty-two years old in 1869, when the alleged forging was committed. Meyer testifies that he was a young man, about twenty-five years old, of reddish or sandy hair, and tall. His name appears to have been Ostollok. It appears that William Shultz bought the lot, which the forged deed professed to incumber, in 1860. This fact we must assume to have been known to the defendant Meyer, (and to the other defendants also, if they saw the abstract of title). Now, if the testimony of William Shultz be taken to mean that Ostollok was, and appeared to be, in 1869, of the age of twenty-two years, it follows that *he* must have bought the lot, if he were William Shultz, when he was thirteen years of age. If he was, or seemed to be, of the age of twenty-five years, in 1869, then it must have appeared to all that made themselves acquainted with the history of the title that, if the person claiming to be Shultz was really he, he must have bought the land at the age of sixteen years. This comparison of dates does not appear to have arrested the attention of Meyer, or either of the Kleinschmidts. In short, a credulity and negligence beyond bounds would seem to have characterized all their proceedings. There is no room to impute bad faith to them. It rather appears that both the Kleinschmidts and Meyer would have been willing to embark their own money on the venture they selected for Kleinsorge, but that they conducted themselves throughout with a singular disregard of all the precautions which are ordinarily suggested by experience to men of adult years is manifest. They seem to have been inquisitive where inquiry was of small importance, and wholly incurious as to points where it was vital. They asked Leibering, who kept a saloon not far from the house where Ostollok at the time resided, not if he knew the name—the personality of the man—but whether he was married. Leibering did not know the man's name at all, a matter which—as Leibering has been keeping a saloon at that

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place for twenty years, and Shultz had owned a lot in the neighborhood for nine years, and had occupied a house on it for at least seven years—ought certainly to have prompted some further inquiry; had seen his face before, and, in the language of Kleinschmidt, "said he knew him [the party pointed out by witness] very well by sight, but did not know much about him." Afterwards, when Ostollok came to execute the deed of trust in the name of Shultz, the inquiry whether he was a married man was resumed, and a person unknown to the inquirers by name at the time, but with whose general appearance they were familiar, was called in to determine, not whether the person offering to execute the deed was really William Shultz, but whether he was a married man. This question was put to, and answered by, the person called in when the deed was executed. His name appears to be Langer. He was not examined at the trial, nor was his absence accounted for.

1. We are quite clear that it is the duty of a notary or other officer, taking an acknowledgment of any party to a deed, to exercise care to avoid a mistake as to the identity of the cognizor, and, when he is not acquainted with such party, to require due evidence of his personality before certifying to the fact that he is satisfied of it. No one has a right to be satisfied of such a fact, when the interests of third persons are involved, upon anything short of legal evidence; and, as we have used this expression, it becomes us to explain what we mean by it.

First, if the party offering to acknowledge a deed be known personally to the officer taking the acknowledgment, that fact shall be certified. Wag. Stat. secs. 13, 14, p. 275. But what is meant by personal knowledge of any one's being the person he professes to be? Clearly, such a faint presumption of the truth of the profession as would arise from the statement of the party himself is not what the law here means; for the statute quoted carefully discriminates between such personal knowledge and the mere

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assurance of any number of credible witnesses. It speaks, in the one case, of the party being personally known to the party taking the acknowledgment; and, in the other, of the party being proved to be the person whose name is subscribed to the instrument by at least two credible witnesses, whose names and places of residence shall be inserted in the certificate.

It is not easy to give a definition of what will constitute "personal knowledge." Every one knows that two intimate friends, who have known each other from childhood to mature age, living in the same neighborhood all that time, may, in the fullest and most unreserved sense, be said to have such "personal knowledge" of each other. But, if a stranger be introduced by a respectable person into any company, it is generally safe to assume that he is what he professes to be, although the person making the assumption has nothing for it but his reliance in the habits of accuracy of the introducer, who, in his turn, may be relying on similar habits in some one else, on whose information he has made the last introduction. It is obvious that, when an officer taking an acknowledgment and making a certificate assumes any such fact, he does it at his own risk. The law warns him, when he has not "personal knowledge" of his own, to resort to certain observances which the law supposes to be sufficient in practice to prevent imposition. The very lowest of these observances is proof by two witnesses who possess such personal knowledge of the identity of the cognizor with the grantor; for the statute says, cautiously, "*at least* two credible witnesses." Hence we see that, in a case of any doubt, it is not only permissible, but imperative, that the number of witnesses should be increased; that, not only their number, but their credit, must be looked to by the officer; that, as their testimony is to be taken, they must be sworn; and that, to secure them for future reference, their names and places of residence must be stated in the certificate. An officer taking all

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these precautions may, of course, be still deceived, and so be led to make a certificate that is calculated to mislead. But such a certificate is infinitely less likely to deceive or mislead than a declaration that the party making the acknowledgment is well known to the officer making the certificate. It puts all persons upon inquiry, and furnishes a clue for conducting it; *and it complies with the law.*

If, after all, the party making the acknowledgment proves to be an imposter, the officer would, we think, if acting in good faith, stand excused. But we are of the opinion that the non-compliance with the formalities enjoined by the statute, and the assumption of any fact which afterwards proves to be no fact at all, will subject the officer to all the risks attendant on the negligent performances of official duty. It may be very courteous to waive all such formalities; it may be disagreeable to speak plainly and tell a party that one is not willing to assume that he is not falsely personating another; but no one is at liberty to practice courtesy or gain popularity, to indulge his own indolence, or avoid unpleasant things at the expense of others. If these others sustain loss by his laxity, it is impossible to listen to assurances from him that he meant well and really did not know better, where it was his plain duty to probe the matter to the bottom, and not to certify at all until he knew what he was talking about. It is perfectly idle for him to protest that he did not know or suspect that his certificate was false. *That* may be granted; but it is nothing to the purpose. His business was *to know that it was true.*

It would be strange if a notary were exempted from the usual—we may say, the universal—consequences of negligence in the performance of duty, occasioning loss to others. If no precedent existed of the exaction of the penalty of such negligence in the case of a notary, we should have no difficulty in applying to them a rule from which no reason for exemption is shown. But the case is not "*res integra.*"

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The instances in which the negligence of a notary renders him liable to the party injured by it are collected in the notes to section 427 of Shearman and Redfield on Negligence, and in notes to section 168 of the same work. There can be no doubt of the liability of the notary under such circumstances. Not one of the instructions asked by the defendant should have been given.

The first in the order in which they appear in this opinion is in the nature of a demurrer to the evidence. When this was asked does not appear. It may possibly have been at the close of the plaintiff's case; but this view is not sustained by the record. If it were asked at the close of the evidence on both sides, it invited the jury to confine itself to that which was adduced by the plaintiff, when possibly the case made by it was strengthened by the testimony for the defense, or, at any rate, a link supplied for want of which the case of the plaintiff might be incoherent. We do not think that such was the case here, or that this instruction could have been properly given at any stage.

The third could hardly fail to mislead the jury. It is difficult to say what was in the mind of the counsel drafting it. If it meant that, if the owner of the money or his agent directed Meyer to lend the money secured by the deed of trust to the person who signed it, then the defendants are not liable—it was objectionable as not being warranted by the evidence. There is no evidence that the task of ascertaining the identity of the party was assumed by Kleinsorge or his agent. If it meant that the owner or his agent simply directed Meyer to perform a ministerial act, then, again, the evidence does not warrant it.

The second instruction substitutes credulity for vigilance, and opens the door to an inquiry which is wholly unreasonable. It also refers to the jury to determine in the recesses of their own consciousness what would be "a reasonable cause to believe" something which the statute requires an officer either *to know personally*, or to take evidence

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respecting it in a prescribed form, and to preserve that evidence and the name of the witnesses in a particular mode. The officer does not know the fact personally, takes no pains to satisfy himself of it as required by law, but indolently and credulously (this is the most favorable conclusion) assumes it to be true without inquiry. It turns out to be false; and words would be wasted in demonstrating the impropriety of listening to such an excuse as is suggested by this instruction.

The fourth instruction is merely a repetition of the second, or it is for a double reason improper. It tells the jury that if Meyer, when he made the certificate, honestly believed that he knew the matters certified, and that said facts were true, then, etc. Does this signify that, if Meyer believes the facts certified to be true, the plaintiff could not recover; or that, if the matters *were* true, he could not? The first hypothesis has been already disposed of; as to the second, we can only say that, as the matters certified were demonstrably false, it would have been highly improper to suggest to the jury the possibility of a verdict directly against the evidence. The ambiguity of the instruction suffices to condemn it, however.

The fifth instruction and the sixth are sufficiently discussed already.

The only serious difficulty we have had in this case arises out of the structure of the petition. It is not alleged in it that Meyer was bound by any obligation of official duty to take the acknowledgment of the deed, and to ascertain and certify the personality of the cognizor, nor that any consideration passed from any one to Meyer for the performance of this task. As there was no demurrer, and no motion in arrest, we are of the opinion that the defendant cannot take advantage of any defect in this particular, and that we are not at liberty to determine a point not presented to the court.

It is not easy to say whether the judgment is against the

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Kleinschmidts alone, or whether Meyer, who was not served, appeared to the action. The answer is ambiguous. This point, also, is not before us for review.

3. The court refused instructions asked by plaintiff, and gave in its own language a declaration of law, which has been obviously mutilated in the copy. The word "but," in the second line of the forty-second page of the record, must evidently be read "not," and the word "correction," in the third line, should be read "correctness," in order that the language should convey an intelligible idea. As the context enables us to make this reading, and as the general sense of the instructions is clear, we will not reverse for this cause. Judge BAKEWELL, having been of counsel, does not sit. Judge LEWIS concurring, the judgment is affirmed.

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E. O. PICKERING, to the use of JOHN W. DRYDEN, Respondent, *v.* MIJAMAN TEMPLETON *et al.*, Stockholders of the Mississippi Valley National Telegraph Company, Appellants. E. O. PICKERING, to use, etc., Respondent, *v.* JAMES E. CARSTARPHEN, Stockholder, etc., Appellant. E. O. PICKERING, to use, etc., Respondent, *v.* GEORGE MARZOLF *et al.*, Stockholders, etc., Appellants. E. O. PICKERING, to use, etc., Respondent, *v.* FRANK A. SUDA, Stockholder, etc., Appellant.

June, 10, 1876.

1. A creditor of a corporation created in 1867 obtained judgment in 1870 against the corporation, and, on the return of *nulla bona* to an execution, prayed separate executions against the shareholders. *Held*, that the creditor was entitled to execution against each shareholder for the amount of his subscription remaining unpaid, and 100 per cent. on the original subscription. 2. That the failure of the corporation to complete the work for which the corporation was established, within a period named by its agent when soliciting subscriptions (such completion not being made a

condition of the subscription, and the shareholder by not paying his subscription having retarded the work), does not discharge the shareholder from liability to pay his subscription, nor from his obligation to satisfy the claims of its creditors.

2. The delivery by a corporation to its shareholders of certificates of paid-up stock, when only part of the par value has been paid, will not prevent a creditor of the corporation from showing the fact, and having execution against such shareholder.

3. The failure of the agent of a corporation to deliver to the corporation the original subscription paper will not discharge those who had signed that paper.

4. A subscriber to the stock of a company cannot plead, in avoidance of his liability thereon, that he merely signed, at the request of the solicitor for the company, as an inducement for others to subscribe.

5. To make a record valid on its face, it is only necessary that it should appear that the court had jurisdiction of the action and the parties, and that a judgment has in fact been rendered. All else is merely formal.

APPEAL from St. Louis Circuit Court.

Affirmed.

Dyer & Emmons, for appellants, cited: Rives *v.* Plank-road Co., 30 Ala. 92; Jenkins *v.* U. T. R. Co., 1 Caines' Cas. 86; Fiser *v.* M. & T. R. R. Co., 32 Miss. 359; Highland Turnpike Co. *v.* McKee, 11 Johns. 100; Graham T. Co. *v.* Hurtin, 9 Johns. 218; Hibernia T. Co. *v.* Henderson, 8 Serg. & R. 219.

Dryden & Dryden, for respondent, cited: Wag. Stat., p. 322, sec. 2; Daly *v.* Timon, 47 Mo 516; West. Boatman Bank Assn. *v.* Kribben, 48 Mo. 37; Wight *v.* Shelby R. R. Co., 16 B. Mon. 4; Lowe *v.* E. & K. R. R. Co., 1 Head, 659; LaGrange Plank-road Co. *v.* Mays, 29 Mo. 64; Piscataqua F. Co. *v.* Jones, 39 N. H. 491; Smith *v.* Plank-road Co., 30 Ala. 650; Cunningham *v.* Edgefield, 2 Head, 23; Vicksburg S. & T. R R. Co. *v.* McKean, 12 La. An. 638; M. & O. R. R. Co. *v.* Cross, 20 Ark. 454, White Mountain R. R. Co. *v.* Eastman, 34 N. H. 141; Mann *v.* Cooke, 20 Conn. 178; Ogilvie *v.* Knox Ins. Co., 22 How. 380; Shaeffer *v.* Home Ins. Co., 46 Mo. 248; Wag. Stat. 270, sec. 9; Prov. Savings Inst. *v.* Jackson Place Skating and Bathing Rink, 52 Mo. 552; Mann *v.* Pentz, 2 Sandf.

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Ch. 257; Slee *v.* Bloom, 19 Johns. 456; Wood *v.* Dummer, 3 Mason, 308; Sawyer *v.* Hoag, 17 Wall. 610; Upton *v.* Hansborough, 5 C. L. N. 242; Upton, Assignee, *v.* Trebilcock (U. S. S. C., Oct. T., 1875), 8 C. L. N. 65; Webster *v.* Upton, Assignee (U. S. S. C., Oct. T., 1875), 9 C. L. N. 1835.

GANTT, P. J., delivered the opinion of the court.

These cases may be considered together.

The plaintiff, Pickering, sued the telegraph company, got judgment at the April term, 1870, of the St. Louis Circuit Court, and, an execution being returned *nulla bona*, etc., he moved the court for separate executions against the several defendants as stockholders of the company. It was alleged that the several defendants had only paid 50 per cent. of their subscriptions. The matter was referred to a referee, and, on the coming in of his report, the court awarded executions against the several defendant stockholders for the amounts claimed by the plaintiff, who had, sometime before this award, assigned the original judgment to John W. Dryden.

All these defendant stockholders resided at the town of Louisiana, Missouri. When the building of the telegraph line was projected, in 1867, the president of the company visited Louisiana, and, after a short stay there, constituted Carstarphen the agent of the company to receive subscriptions at that place. Both the president and Carstarphen expressed confident expectations of the early completion of the work, and of the great profits that would ensue to the shareholders. They seem also to have believed that only a percentage of the subscriptions would ever be needed. They expected the line to be completed in six months. Nothing of this expectation was incorporated in the terms of the subscription, and the plaintiff was a stranger to its expression. Through various causes, one of which appears to have been the slackness of the subscribers in paying their calls, the completion of the work was seriously delayed.

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In 1868 the defendant subscribers appear to have paid nothing towards their respective subscriptions. In that year the home office issued certificates for the stock of each, placed them in the hands of a director, and he proceeded to Louisiana to make a settlement with the subscribers. When he convened them they at first flatly refused to pay anything, for the reason that the work had not been completed in six months. One of them claimed, in addition, that he had only signed the subscription paper to enable Carstarphen to get the names of some of his Dutch friends; that, in a few days, he called on Carstarphen and told him to strike off his name from the list, as he wished to have no more to do with it; and that Carstarphen did this. After some discussion Marzolf & Seibert paid 50 per cent. of their subscription, and received a certificate of full paid stock; Templeton & Gentry did the same; and Carstarphen, claiming a credit to the amount of 50 per cent. on account of services as agent, received also a certificate of full paid stock. None of these, however, had paid more than 50 per cent. on his or their subscription. Suda, who had subscribed as above shown, had paid nothing at all.

The original paper taken by Carstarphen has never been returned to the home office. It was claimed that, on this account, the subscription in each case was incomplete and not binding.

The referee found the facts above recited, and that the several defendants were liable for the amount unpaid on their several subscriptions, and 100 per cent. beside. Exceptions were duly saved, and the cases are before us on appeal from the judgment of the Circuit Court confirming the report of the referee and awarding execution accordingly.

1. We find no error in these records. The plaintiff was, in every instance, entitled to all that he claimed. There seems to be no ground for denying that Marzolf & Seibert, as well as Templeton & Gentry, did subscribe for the stock of the telegraph company, and that they only paid 50 per

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cent. of the par value of their stock. They are, then, clearly liable to the creditors of the company for the balance remaining unpaid, and 100 per cent. additional (sec. 11 of ch. 62, General Statutes of Missouri, p. 328), unless for some of the causes alleged the subscription was a nullity. These causes are: (1) That the failure to complete the work within six months avoided the subscription; (2) that, admitting the subscription to be valid, the certificate and the agreement between the company and Templeton & Gentry and between the company and Marzolf & Seibert, that the stock was full paid, was conclusive as to the point; (3) that the failure to return the original subscription paper to the home office prevented the completion of the contract of subscription; (4) that, as to Suda, his withdrawal of his name, at the end of a few days, after it had been annexed to the subscription paper—acquiesced in, as it was claimed to have been, by Carstarphen—discharged him (Suda) altogether. We are of opinion that there is no validity in any of these causes.

2. As to the first, the excuse hardly becomes a person of adult years. One is impatient at being gravely told that the glowing anticipations of the projectors of a new enterprise were disappointed by the hard realities with which its promoters were compelled to struggle; that some of the calamities which every one of common sense knows to be inseparable from all human effort dimmed the practical triumph of the adventure. But, when those whose duty it was to furnish the capital for the work—the early completion of which was hoped for—have been delinquent, and yet complain that the work was not done without a check, it is with difficulty that the objection can be supposed to be seriously made.

In the present case, nothing seems to have been said which could, as between the company and the defendants, have amounted to a condition or qualification of the obligation of the subscribers. As against the company itself,

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everything of this kind would have been closed when the certificates of stock were taken, in 1868, even if the early completion of the work had been a condition of the subscription. *A fortiori*, all disputes on this subject were made impossible, as far as creditors were concerned. We will not examine into the case of a subscription being vitiated by false representations, on the faith of which the subscription was made. No such case is before us.

3. Very little time need be spent in disposing of the second objection. To allow it would be to enable the members of a corporation to evade, by a declaration false in every particular, the plainest provisions of a statute passed to give security to its creditors.

4. The third point is of no force whatever. The contract of subscription was complete when it was received by the agent of the company. The subsequent casual or intentional destruction of the list, or the bad faith of Carstarphen toward his principals, could have no effect to liberate the stockholders from their obligations to the creditors of the corporation.

5. The special matter set up by Suda is equally bad in law and in morality — or, it is bad in law because it is condemned by morality. He seems to have lent his name to Carstarphen in order to allure other subscribers, under the agreement that, when this end had been served, his name was to come off the list. It would seem that Suda insisted that he did not sign the original subscription paper, but another—in order to facilitate the success of the scheme above stated. The referee, however, thinks that Mr. Suda is mistaken here, and we hope the referee is correct. The fact, if established as contended for by Mr. Suda, could not possibly serve for his legal extrication, and in other respects would be injurious to him. Of course Carstarphen had not, and could not possibly have had, power to make such a bargain with Suda as is above suggested, to the prejudice of

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the creditors of the corporation. The authorities cited by respondent are decisive on all the points we have considered.

6. Another objection was made at the hearing which, it appears, was then urged for the first time. It is that the judgment in favor of Pickering and against the telegraph company was a nullity for want of a finding for the plaintiff, Pickering. The objection being a formal one, it is necessary to set out the entry in which the supposed omission occurs:

"Ezrom O. Pickering *v.* The Mississippi Valley National Telegraph Company. Monday, May 9, 1870. Now, at this day, come the parties, by their attorneys, and, waiving a jury, this cause is submitted to the court upon the pleadings and proofs, and the court, after hearing the proofs, doth assess the damages of said plaintiff, by reason of the premises," etc. "It is, therefore, considered," etc.

It is conceded that this entry would have been above challenge if, between the words "doth" and "assess," the further words "find the issues for the plaintiff, and," had intervened. The want of these, it is urged, makes the entry a nullity. We cannot assent to this view. In the first place, the statute of jeofails (sec. 19, ch. 168, General Statutes of Missouri, p. 671) declares that, after verdict, "judgment shall not be staid, nor shall the judgment upon such verdict * * * be reversed, impaired, or in any way affected by reason * * * of any informality in entering a judgment, or making up the record thereof." Here, indeed, the appellant insists that the "verdict" is the particular thing omitted; that there is no finding for the plaintiff. But is this correct? We think not. The cause was submitted to the court, sitting as a jury, by both parties. That the court found for the plaintiff is clear; for it could not otherwise have proceeded to assess the damages in his favor. The error, if error there be, consists in the

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misprision of the clerk in making the entry. But the section just quoted goes on to declare that the record shall not be held to be defective "for any other default or negligence of any clerk or officer of the court * * * by which neither party shall have been prejudiced." Nothing is plainer than that neither party was in fact prejudiced by the informality complained of. The defendant (the telegraph company) appears to have been wholly insensible to it; and when the case was taken to the Supreme Court, and various errors were assigned, no mention was made of this. The Supreme Court, at the March term, 1871, directly affirmed this judgment, which, when impeached in a collateral way, we are asked to declare a nullity from the beginning. We cannot do this. We rather think that, when the case was before the Supreme Court (47 Mo. 45), the record was criticised and examined under a motion in arrest of judgment. But, in the second place, if this point has been made and urged with all conceivable persistency, we do not think it could at any stage have availed the objector.

Had it been made timefully indeed—that is to say, at the April term, 1870, of the St. Louis Circuit Court—it would have been commendable for that tribunal to have ordered a formal correction of the record by supplying an ellipsis plainly suggested by the context, according to section 20 of chapter 168, page 671. But without this the entry may defy challenge. Since the luminous decision in *Grignon's Lessee* v. *Astor*, 2 How. 319, this matter has hardly been open to doubt, though the question has often been brought up anew, and received the same determination. See *Maxwell* v. *Stewart*, 22 Wall. 77, and *Martin* v. *McLean*, 49 Mo. 361—not to pause on intermediate cases. The terse language of the present chief justice of the Supreme Court of the United States (22 Wall. 79, above quoted) is, "to make * * * a record valid upon its face it is only necessary for it to appear that the court had jurisdiction of the subject-matter

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of the action and of the parties, and that a judgment had in fact been rendered; all else is form only."

The judgment is affirmed. Judge BAKEWELL concurs; Judge LEWIS not sitting.

JOHN B. DYER *et al.*, Appellants, *v.* JOHN BRANNOCK *et al.*, Respondents.

June 10, 1876.

1. A sued several defendants jointly in ejectment, setting up separate holdings. He was ordered to elect against whom he would proceed, and did so, dismissing as to the others, and saving no exceptions to the order. Afterwards he became a nonsuit on another matter, which was set aside by the court in general term. *Held*, that, upon the cause being remanded to special term for trial, it was not competent for A to proceed against those defendants as to whom he had dismissed before becoming nonsuit.
2. A cohabited with B, and a child, C, was born of this intercourse. He subsequently married D, to whom a child was born, who survived D, but died in infancy. Afterwards A resumed his intercourse with B, living with her until his death, acknowledging the child, C, as his, but no marriage ceremony of any kind took place between them at any time. D died seized of real estate, and the descendants of C claimed it as the heirs of A, alleging that A inherited it from his deceased child by D. *Held*, 1. That C was a bastard child of A. 2. That nothing was done which legitimized C. 3. That the descendants of C could not claim title as the heirs of A.
3. If a right of action to recover real estate accrued to a person under disability after February 2, 1847, then such person's right of action is forever barred, if suit be forborne for twenty-four years, notwithstanding such disability.
4. If such disability continue for ten years or more, but less than twenty-four years, during which time suit is forborne, and, upon the removal of the disability, three years in addition elapse without suit, the bar is complete.
5. It is error to instruct a jury as to the effect of adverse possession without also instructing them as to what constitutes adverse possession.

APPEAL from St. Louis Circuit Court.

Affirmed.

Pope & Randall, for appellants, cited: Wag. Stat. 531, sec. 11; Linceum *v.* Linceum, 3 Mo. 441; Stones *v.* Keel-

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ing, 5 Cal. 145; Sleigh *v.* Strider, *Ib.* 439; Rice *v.* Efford, 3 Hen. & M. 224; Johnson *v.* Johnson, 30 Mo. 72; Buchanan *v.* Harvey *et al.*, 35 Mo. 281; Graham *v.* Bennett, 2 Cal. 503; 1 Ter. Laws of Mo. 66, sec. 3; Holabird *v.* Atlantic Mutual Life Ins. Co., Am. Law Reg. Sept. 1873, 566; 1 Bishop's Mar. & Div., secs. 3, 229, 269, 272, 277, 283; Schouler's Dom. Rel. 40, 41; 2 Kent's Com. (12th ed.) 87; 2 Greenl. on Ev. sec. 460; Fenton *v.* Reed, 4 Johns. 52; Clayton *v.* Wardell, 4 N. Y. 230; Londonderry *v.* Chester, 2 N. H. 279; Chiseldine's Lessee *v.* Brewer, 1 Har. & McH. 152; Canjolle *v.* Ferris, 26 Barb. 177; Van Tuyl *v.* Van Tuyl, 57 Barb. 235; Carmichael *v.* The State, 12 Ohio, 553; The State *v.* Fry *et al.*, 4 Mo. 120; Keer *v.* Barnes, 29 Mo. 377; Jackson *v.* Hazen, 3 Johns. 441; Fosgate *v.* Herkimer Mnfg. Co., 2 Kern. 580; Vorhie's Pr. 598; Keene *v.* Baine, 29 Mo. 377; 2 Sellon K. B. 178, 196, 229; Rem. on Eject. 59, 187, 188; Barnes, 176; Buller N. P. 98; Jackson *ex dem.* Haines *v.* Woods *et al.*, 5 Johns. 278; Grimstone *v.* Bourgess *et al.*, Barnes, 176, 196; Jackson *v.* Andrews, 7 Wend. 158; Pickering's Lessee *et al.*, 12 Serg. & R. 435; Cambden *et al.* *v.* Haskill, 3 Ran. 462; Adams on Eject. 262, 291; Tyler on Eject. and Adv. Poss. 625, 637, 642, 644, 649; Hickman *v.* Boyd, 1 Mo. 495; Jones *v.* Snedecor, 3 Mo. 390; Pratt *v.* Rogers, 5 Mo. 51; Downing *v.* Boweleier, 21 Mo. 149.

Cline, Jamison & Day, for respondents, cited: Richards *v.* Brehem, 73 Penn.; Russell *v.* Bissell, 55 Barb. 325; Guardians of the Poor *v.* Nathans, 2 Brew. 149; Lenscum *v.* Lenscum, 3 Mo. 441; Wag. Stat. 916, sec. 4; Smith *v.* Bartis, 9 Johns. 181; Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 133; Doe *v.* Jesson, 3 East, 309; Bush *v.* Bradley, 4 Day, 298; Bunce *v.* Wolcot, 2 Conn. 27; Doe *v.* Jones, 47 T. R. 200; Stowell *v.* Zoak, Plowd. 353.

GANTT, P. J., delivered the opinion of the court.

This was an ejectment, commenced on August 11, 1872, to recover possession of part of survey 3,182, of a con-

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firmation by the act of 1836, to the representatives of Motard, lying in the *cul-de-sac* of the Grand Prairie common field. Upwards of 100 persons occupied different parts of this land. They were all sued together as joint trespassers. They answered separately, denying the title of plaintiff, and also denying any joint occupation. Each set up his several holding. The statute of limitations was also set up in each case. Some alleged a possession of twenty-four years, others thirty-six. Plaintiffs demurred to some of these answers, and moved to strike out others of them. The court overruled both motions and demurrers. The case came on for trial in February, 1873. The court ordered the plaintiffs to elect against which of the defendants they would proceed, and to dismiss the suit as to all the other defendants. Whereupon plaintiff elected to proceed against Brannock, and dismissed as to the other defendants. At a later period of the trial plaintiff became non-suit, with leave etc., and the general term set this non-suit aside. The cause came on to be tried again in November, 1874, when there was judgment for defendant Brannock, which was affirmed in general term, and the case comes before us by appeal. When the cause was tried in November, 1874, plaintiffs claimed, notwithstanding their dismissal of the suit as to all but Brannock, to be entitled, by virtue of the reversal of the ruling by which they had been driven to a non-suit, to proceed against all the original defendants. The court refused to allow this, and plaintiff excepted. At the trial evidence was given of a confirmation to Motard's representatives of a tract of land in the *cul-de-sac* of the Grand Prairie, and that James Daud and Sally Adams were such representatives as to a portion of this tract. Sally Adams was, in November, 1824, married to Zachariah Wilson. She died in child-bed, in 1826, leaving a child, who died in 1827.

Zachariah Wilson was a river-pilot. On August 24, 1819, he agreed with Jane Collins that they would thereafter live together as man and wife. This agreement they communi-

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cated to the mother and brother of Jane, and to some boarders in the family, and, about ten o'clock, P. M., Jane and Zachariah retired to an apartment prepared for them. They cohabited until September 13, 1819, when Wilson left her and accompanied Major Long on his celebrated expedition westward. She appears to have seen no more of him until 1830. At that time she was living in St. Charles with her daughter, Cynthia Elizabeth, the fruit of her connection with Wilson. This child, she tells us, was born on April 28, 1820. Wilson wrote to her that if she would come to St. Louis and live with him again he would take care of her and her child, which he acknowledged to be his also. She consented to this, and thereafter lived with him until his death, in 1836. Cynthia lived with them, and Wilson acknowledged her as his daughter. Shortly after Wilson's death, Cynthia married Abner Dyer, and the plaintiffs are the children of that marriage. Cynthia died in July, 1869; Abner in June, 1870. After Wilson had gone away, Jane Collins heard from others that he had left a wife and children in his native State. He was about twenty-seven years old in 1819; she was about nineteen. From first to last no marriage ceremony took place between Jane Collins and Zachariah Wilson. The nearest approach to it was their standing up in the parlor of her mother's boarding-house, in St. Louis, on August 20, 1819, joining hands, and assenting by bowing their heads, in the presence of several witnesses, to the statement that they were going to live together through life, and then retiring. All these facts appear by the testimony of Jane Collins, or Jane Wilson, who testified at the trial as a witness for plaintiff, and who seems to have told the truth with great candor.

After the death of Wilson, a proceeding in partition was commenced, in which the tract of land sued for was set off and allotted to the "unknown heirs of Zachariah Wilson."

There was evidence tending to show that defendant, and those under whom he held, had been in possession of the

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land, with claim of title from 1844 to the commencement of this suit, claiming it as their own.

The court charged the jury as follows:

"You are instructed that the premises sued for are part of a tract of land confirmed to the representatives of Joseph Motard by the act of Congress of July 4, 1836, and that the title to the premises was vested in Sarah Ann Adams at the time of her death. The plaintiffs seek to recover as the alleged descendants of Zachariah Wilson, to whose heirs, then unknown, the portion of the Motard tract which included these premises was set apart by the decree of the St. Louis Circuit Court rendered in 1838. Whether the plaintiffs can recover as the descendants of Zachariah Wilson will depend upon their having established (1) that they are such descendants, and (2) that Wilson himself, having title to the premises sued for at the time of his death, transmitted such title, by descent, to the plaintiff.

"If you believe from the evidence that one Cynthia Elizabeth Wilson was the daughter of Zachariah Wilson, that said Cynthia Elizabeth married one Abner W. Dyer, and that plaintiffs were born of such marriage, then you will find that plaintiffs are the descendants and heirs of Zachariah Wilson. If you believe from the evidence that Wilson was married to Sarah Ann Adams in the year 1824, that a child was born of such marriage, that Sarah Ann died leaving such child surviving her, and that Wilson survived said child, then, upon the death of such child, the title to the premises in controversy became vested in Zachariah Wilson; and if you further find from the evidence that, in the year 1819, at the town of St. Louis, intending thereby to contract marriage, the said Wilson and one Jane Collins mentioned [*sic*] agreed to live together thenceforward as man and wife, and that of the union thus formed Cynthia Elizabeth Wilson was born, and that she survived the said Wilson, then the title to the premises sued for became vested in said Cynthia, and, at her death, descended to the plaintiffs

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as her heirs. But if you believe from the evidence that when they came together, in 1819, that said Wilson and the said Jane Collins did not intend to contract marriage, but to merely live together for purpose of illicit cohabitation, and that of such intercourse the said Cynthia was born, then, upon the death of her father, she did not become vested with the title to the premises sued for—unless you find from the evidence that, subsequently to the birth of said Cynthia, and after the death of Sarah Ann Adams, the said Wilson and the said Jane Collins, intending thereby to intermarry, mutually agreed to live together thenceforward as man and wife, and did so live, and that, after such reunion, the said Wilson recognized the said Cynthia as his child. If the conditions of the legitimacy of said Cynthia thus indicated have, in your opinion, been satisfied by the evidence, and you believe that the plaintiffs are descendants of said Wilson, then the deeds, documents, and records read in evidence by the plaintiffs complete the legal title in these plaintiffs to the premises sued for, and they are entitled to recover, unless the defendant has established his defense under the statute of limitations. Upon this branch of the case you are instructed that a party who acquires title to land under the statute, by continuous possession adverse to the true owner, acquires all the title of such owner precisely as if the possessor had received a deed from such owner. But, in order to give title under the statute, the possession must have been had during the period limited by statute which has elapsed since a right of action accrued to the real owner, and must have been adverse, open, notorious, continuous, and under a claim of title. And you are instructed, further, that the statute begins to run in favor of one in possession of real estate, as against the true owner, only from the time when such possession becomes adverse to such owner, and that, when such owner is a married woman, and she acquires a right of action during coverture, the statute does not begin to run against her until after the disability

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of coverture has ceased, and that she, and those claiming under her, have three years after the termination of such disability within which to sue for possession, unless the occupant has been in possession openly, notoriously, continuously, and adversely for the term of twenty-four years next before the commencement of such suit. Hence, if you believe from the evidence that at the time when, either in person or through their tenants, the defendant, or those under whom he holds, entered into possession of the premises sued for, Cynthia E. Dyer was a married woman; that she remained a married woman until her death; that within three years after such death this suit was brought and that the defendant, and those under whom he holds, had been in possession of the premises sued for during a period less than twenty-four years next before this suit, then the plaintiffs are entitled to recover, and you will return a verdict accordingly. But, on the other hand, if you believe from the evidence that, at the time when this suit was brought, more than three years had elapsed from the death of said Cynthia, and that the defendant, and those under whom he holds, either through themselves or by their tenants, had been in possession of the premises sued for during a period of ten years or more next before such suit; that such possession was adverse to all others, open, notorious, continuous, and under claim of title, then the plaintiffs cannot recover, and you will find for defendant.

"For the purpose of determining whether there has been a claim of title on the part of the defendant, and those under whom he holds, you may have reference to the deeds read in evidence on his part; but such deeds are evidence before you for no other purpose. If you believe from the evidence that, under such claim of title, the parties under whom defendant holds, either by themselves or by their tenants, took possession of a portion of the tract, of which the premises sued for formed a part, asserting title to the whole tract, and exercising acts of ownership over such

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tracts, either by maintaining fences upon or paying taxes upon the same, then the actual possession of such part was possession of the whole for the purpose of the defense. And you are instructed, further, that, if you find that the possession of the defendant, and those under whom he claims, was adverse, open, notorious, and continuous, as before indicated, then the bar of the statute will prevent a recovery, even if the plaintiffs, and those under whom they claim, had no actual knowledge of such occupancy by the defendant, and those under whom he claims title. If you find for the plaintiffs, you will find that they are entitled to the possession of lots 10, 11, 12, and 13, of block 1, of Darby's addition to the city of St. Louis—these lots being the only part of the tract sued for of which defendant has been shown to be in possession. And you will, if you so find for plaintiffs, assess their damages at the sum of one cent, and find the value of the monthly rents and profits to be nothing."

The counsel for plaintiff excepted to this declaration of the law applicable to the facts in evidence, and asked a number of instructions, all of which the court refused, against their exceptions. All of those which relate to the possession of the property and the operation of the statute of limitations we omit. The case does not, in our opinion, turn upon the defense made by Brannock, and accordingly we notice only those of the instructions asked by plaintiffs, and refused by the court, which referred to the title of the children of Cynthia Elizabeth. They were the following:

"If the jury believe that, after the death of Sarah Ann Adams, Zachariah Wilson and Jane Collins voluntarily came together and cohabited as husband and wife, and were reputed to be such in the community in which they lived, and continued to live together and bear the relation of husband and wife so long as he lived, then, although it does not appear in evidence that they were formerly [*sic*] married according to the laws of Missouri prescribing

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how marriages may be solemnized, yet the fact of this voluntary cohabiting as husband and wife, and being so recognized and reputed in the community in which they lived, affords presumptive evidence of marriage, and the jury may infer marriage between them from these facts.

"If Zachariah Wilson had a bastard child born of Jane Collins, and if he afterwards intermarried with Jane Collins and treated his bastard child as his own, then this child was legitimated; and if the jury further find that this was an only child, then such child was his heir, and inherited such land as he died seized of."

The instruction immediately following that last stated declared the invalidity of the alleged marriage, in 1819, between Wilson and Jane Collins, unless certain facts, to the existence of which the bill of exceptions gives no support, were shown to the satisfaction of the jury. The refusal of this instruction could not have prejudiced the plaintiffs.

It will be seen that the learned judge who tried the cause charged very favorably for the plaintiffs on the question of the title of the plaintiffs—quite as favorably as the plaintiffs themselves claimed; more so, we think, than the law warranted. As the judgment was for the defendant, and he has taken no exceptions to the action of the court below, such errors, if existing, are not ground for a reversal. On the subject of the statute of limitation we think, however, that the circuit court erred, and to the prejudice of the plaintiffs.

In fact, this charge, though admirably clear and worthy of imitation, as putting the jury in possession without ambiguity of the views of the law entertained by the court, is liable to criticism in several particulars. It states as *law* matters in respect of which indeed there was no serious contest, but which are matters of fact, nevertheless. Except by consent of parties, or unless they are estopped by the record to deny it, a court is not at liberty to tell the jury that the land in controversy is part of a certain confirma-

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tion, or that the title to the land sued for was, at any time, vested in a particular person. We do not find this estoppel or this consent in this transcript; but this is an error committed in favor of plaintiff. On the subject of limitations and adverse possession, we think the court committed serious error. In the first place it tells the jury the effect of "adverse possession" on the title of the documentary owner, without defining the meaning of the phrase; without telling them when, and under what circumstances, "possession" becomes "*adverse.*" Yet it is well known to the profession that few definitions have been the subject of more repeated and more careful judicial inquiry than this of "adverse possession." From the time of the decision of *Taylor* v. *Horde*, 1 Burrow, 60–125, down to the present day, there have been numerous examinations of the really very subtle distinctions between "possession" and "adverse possession." The line of demarkation between "permissive possession" and "adverse possession" may be plain enough, but in the case of *Chouquette* v. *Barada*, tried and determined three times in the Supreme Court of Missouri (23 Mo. 331; 28 Mo. 491; 33 Mo. 249), in the cases of *Dowdall* v. *Byrne*, Batty, 373; *Cook* v. *Nicholas*, 2 Watts & S. 27; *Faixclaim* v. *Shackleton*, 5 Burr. 2604; *Warfield* v. *Lindell*, 30 Mo. 282; *Lapeyre* v. *Paul*, 47 Mo. 586, and numerous others, the question whether a possession was adverse or not, and what were the essential characteristics of an "adverse possession," was the principal inquiry which engrossed the attention of court and counsel.

Passing from this point, however, and assuming that the jury were familiar with distinctions respecting which, at any rate, able counsel have, down to a very recent time, differed in opinion, we come to this passage in the charge:

"But, on the other hand, if you believe from the evidence that, at the time when the suit was brought, more than three years had elapsed from the death of said Cynthia, and that the defendant, and those under whom he holds,

either through themselves or by their tenants, had been in possession of the premises sued for during a period of ten years or more next before such suit, and that such possession was adverse to all others, open, notorious, continuous, and under claim of title, then the plaintiffs cannot recover, and you will find for the defendant."

Now, the undisputed fact was that Cynthia had been married in 1836, and that she died, in July, 1869, a married woman. The defendant went into possession in 1844, at the earliest, but the survey of the confirmation of 1836 was not approved until June 11, 1841. Until then the confirmees had no right of action, and, consequently, until then no presumption could be set up against them. At that time Cynthia was under disability, and, until the act of 1847, the existence of this disability prevented the running of the statute. Under the act of February 2, 1847 (Session Acts, p. 94, and following), limitations, for the first time in our State, ran against a person who was under such disability when the cause of action first accrued. Under that act the bar became complete against such a person in twenty-four years. It follows that, until 1871, at earliest, there could have been against Cynthia Elizabeth, had she survived, no bar arising from an adverse possession of her land; and, as against those claiming under her, if she and her husband had both died the same day, no period short of twenty-four years would have sufficed to complete the bar unless, at least ten years having passed during the continuance of the disability, three years in addition had elapsed after its removal. Hence no possession short of one having a commencement in 1859, and having endured up to the death of Cynthia, and then supplemented by three years of failure to sue on the part of those to whom her title descended, could have created the bar of the statute. But it is quite consistent with the instruction of the court that an adverse possession, taken on August 10, 1862, and continued up to the bringing of this suit, would bar the right

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of action of the heirs of the party having the documentary title, though she had been, in 1862, a married woman, and died a married woman, in July, 1869. We think the true construction of the act of 1847 (and our present statute is couched in the same terms) is that if the owner of the land is, when it is first occupied by an adverse holder, under any of the disabilities enumerated in the act, the period during which the disability continues—though more than ten, if less than twenty-four, years—shall not constitute a bar to his or her action, and he or she may, within three years after the removal of the disability, maintain an action for its possession. If, however, the disability continues for twenty-four years, and during all that time an action is forborne, the bar will be complete. The words of the act are: "Such person may bring such suit or action, or make such entry, after the time so limited, and within three years after such disability is removed." What is "the time so limited?" Clearly it is the period of ten years named in the preceding section. The action may be brought after the expiration of this period and *before* the end of (within) three years following the removal of the disability. The language employed by the draftsman is not very well chosen, but we think it yields its meaning to a little careful examination. We will not dwell on the argument in favor of the construction we suggest. To us it seems very plain; we think the rule laid down by the Circuit Court is erroneous; that the error would ordinarily have operated to the prejudice of the plaintiff, and made it our duty to reverse the judgment for the defendant, except that we consider it manifest from the transcript that no conceivable instructions on the subject of limitations, and not even the exclusion of all the evidence offered by defendant on the subject of adverse possession, could warrant a judgment for the plaintiff.

2. We are of the opinion that plaintiffs proved affirmatively that they have no title. They claim as the heirs of

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Wilson. Now, they may be his heirs, and he may never have been seized of this land; or he may have been seized of it, and they may fail to show that they are his heirs. It so happens in this case that every circumstance tending to prove one of these propositions at the same time disproves the other. He can only have been seized of the land by virtue of being lawfully married to Sally Adams, and inheriting to her child, for, waiving all other objections, if he had another wife living in 1824, when he married Sally Adams, his marriage with her is bigamous, and our very indulgent statute, which in many instances benignantly refuses to inflict upon the innocent child the penalties due to the transgression of the parents, excepts the case where a prior marriage existed at the time the second was solemnized. Moreover, it is one thing to admit the innocent child in any case to the privileges of legitimacy, and quite another to permit the guilty author of the wrong to take any advantage resulting from his own misdeeds. We should, therefore, have great difficulty in admitting that Wilson had died seized of this land; but the difficulty in considering that the plaintiffs are his heirs is absolutely insuperable.

Marriage, so far as it is a contract at all, is a civil contract under our laws; but we agree with many thoughtful and learned men in thinking that much confusion of idea and laxity of reasoning have arisen from speaking of it as a contract at all. It is an instance of the misleading nature of a *half truth*. The half of a subject is taken and considered as if it were the whole; and conclusions are drawn from the first, without regard to the modifying influence of the second, half. If marriage be a civil contract, and nothing more, why do not all the incidents of other civil contracts attach to it? Why cannot the immediate parties, who, according to this theory, are the *only* parties, dissolve it at pleasure? If *their* consent, and nothing more, were necessary to make it, why cannot the same force unmake it? The legal maxim "*Eodum modo quo quid constituitur, eodem*

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modo dissolvitur " is supposed to be of universal application. If it fails in respect of the contract of marriage, it is very strange that the incongruity has received no attention from writers on jurisprudence.

The plain truth is that it does *not* fail in respect of this important subject. Marriage is *not* established by the mere pleasure and consent of the two parties most immediately concerned. These two alone may, by their mere consent, effect concubinage, which is a very different thing from marriage, and these two alone can also put an end to this unlawful connection whenever they come under the influence of a returning sense of propriety. But marriage is a condition in which the two parties whose consent is indispensable, *with the consent of the State*, whose concurrence also is indispensable, proceed to take upon themselves obligations of a solemn and indissoluble character. It is true that provision is made for the exceptional discharge of the parties from their vows, but only under circumstances which demonstrate that they were never rightfully made, or when the faithlessness of one of them leaves no room to doubt that the object of the institution will be promoted by dissolving the engagement. Even this is not all. Let these facts be capable of ever so complete proof, the State does not permit the immediate parties to declare them, and to deduce the result of dissolution. It requires the inquiry into their existence to be conducted in a public manner, and with all the safeguards which foresight has provided for the prevention of collusion ; and only upon terms ascertained by the statute, which is the voice of the State, can the courts, which are its ministers, proceed to put an end to a condition which was originally designed to be co-extensive with the joint lives of the immediate parties.

We have said that the consent of these immediate parties is indispensable to constitute marriage ; to argue from this imperfect premiss that *nothing else* is indispensable would be indifferent logic. The State, by whose ordinances, so

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far as our conclusions reach, or are intended to reach, the institution exists, has something to say here. It does not permit *all* persons who are merely willing to do so to contract marriage. It defines and enumerates certain disabilities, and declares that where these exist the forms of marriage will not avail to render the union legal, or to clothe the man and woman who conform to the solemnities of the statute with the character and qualities of husband and wife. But, on the other hand, such man and woman, though ever so willing and consenting, and though free from all legal disabilities, are required to signify, in some authentic and undeniable manner, their intention to become husband and wife.

It is of vital importance to society that no doubt should rest on the existence of a marriage, and the State declares that certain ceremonies, the preservation of the evidence of which is easy and natural, are essential to that existence. These are placed within the reach of all who in good faith desire their aid. To neglect their observance is to make proclamation of the want of good faith. From the earliest times it has been the mandate of the law in Missouri that marriage must be solemnized in one of several defined modes. Every indulgence has always been given to the views of those who regard it as a sacrament, deriving its sanctity from religious observances, or to the sentiments of those who, not regarding it as a sacrament, yet associate it with religious rites, and prefer its solemnization by ministers of their own creed. The law expressly adopts the forms cherished by any sect of religion, and its ministers are authorized to give a legal sanction to their ritual ceremonies. But provision is also made for that class who are careless of such considerations; and officials wholly unconnected with any church are, in addition to priests of all denominations, indicated as competent to receive the acknowledgment and grant the certificate which constitutes legal marriage, and furnishes the evidence of it, which the

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law requires. To legislation of this nature emphatically applies that canon of construction, "*expressio unius est exclusio alterius.*" The law which prescribes the requisites to a legal marriage necessarily declares that, where these are wanting, no legal marriage exists. It may, of course, happen that, though all these requisites have been actually complied with, the best evidence of them may be swept away. We can conceive of a case where, immediately after such compliance, the record of it and all the witnesses, except the immediate parties, may perish, or such a destruction may occur after an interval of time. In the first case it would be inexcusable, and almost incredible, negligence to omit a repetition of the ceremony. In the second case the conduct of the parties, their living together and treating each other as man and wife, and their acceptance as such by their friends and society, furnish presumptive evidence of the performance of all those conditions, the observance of all those forms, which are prescribed by law to render such conduct lawful. Still, this is only presumptive evidence; it *tends* more or less strongly to establish a certain conclusion, but, if any direct evidence on the point exists, the value of the presumptive evidence ceases altogether. The direct evidence shows that the conclusion is true or untrue. In the first case the presumptive and secondary evidence is superseded by evidence of a higher nature; in the second it is completely overthrown.

The language of Mr. Justice Story—not in the text of his celebrated treatise on the Conflict of Laws, but in the *note*, in which he expresses without reserve his own views on this interesting subject—appears to us worthy of special approval (note to sec. 108): "I have, throughout, treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent

and contract of the [immediate] parties, and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belongs to ordinary contracts."

We have taken the liberty to interpolate a word for the sake of emphasizing a distinction which, we think, was clearly in the mind of the accomplished author of the passage we have cited; and, with the definition thus interpreted, we express our entire concurrence.

Marriage is "an institution of society;" the State is a party to the bargain which a man and woman make when they become husband and wife. Therefore, only in such modes as the State has prescribed can the condition of marriage be established, and only in such modes and for such reasons as the State has declared beforehand, or such as by the exercise of its inherent power it may thereafter prescribe, can the obligations of marriage be dissolved. The parties most immediately concerned are powerless to do this. This is so emphatically true that in a divorce case few things rouse the vigilance and criticism of a court of justice more than any appearance of mutual consent to a separation. But it was not at one time so clearly perceived that the third party, the State, acting through its legislative department, was equally powerless. This, however, is settled law in Missouri. *Gentry* v. *Fry*, 4 Mo. 120; *Bryson* v. *Campbell*, 12 Mo. 498; *Bryson* v. *Bryson*, 17 Mo. 590. It is otherwise, of course, in those governments where, as in Great Britain, the Parliament is supreme, unfettered by limitations of any kind except such as are imposed by the nature of matter, and speaks and acts with all the power and authority residing in the three estates of the realm.

If it be now replied that in a certain sense the State is a party to every contract, and that marriage does not cease to come within that description because the State is a party to it, the rejoinder is that it is enough for the present argument if the State is admitted to be a necessary party to

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the *contract of marriage*. This being conceded, we draw the necessary inferences, and are not careful about terms. For, if the State be a necessary party, it of course intervenes only on its own conditions and in its own modes. If these do not have place, the State is no party, and there is no marriage.

There was no compliance, in 1819, by Zachariah Wilson and Jane Collins, with the requirements of the law. They did not contract marriage, nor attempt to contract it. They merely made arrangements for concubinage, and we see by the light of the conduct of one at least of the parties to this arrangement, what his intentions were. After three weeks of illicit intercourse he left his companion, and for more than ten years, during which he formally married another woman, he and Jane Collins were strangers, and sustained to each other no legal or actual relation. Whether Wilson practiced any deception on Jane Collins in 1819 is nothing to the purpose. We see no evidence of such deception, however; she appears to have known perfectly well that she was forming with him a degrading and immoral connection, and that she then and afterwards deliberately accepted the consequences of it. It should be added that she acted, if unchastely, yet bravely, consistently, and truthfully. But, had she been ever so much wronged and deceived, it would not have affected this question. We are inquiring whether she and Wilson were married in 1819, and it is not only manifest that they were not, but that neither of them supposed that they were.

3. Was anything done after the death of Sally Adams to legitimize the fruit of this concubinage? The answer is, nothing. Of course, nothing short of compliance with the law will secure a consequence which is promised only as a reward of such compliance; and, hence, it is necessary to note what the law requires.

The act of the General Assembly which was in force in 1830, and has continued in force ever since, was approved

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February 11, 1822, and is to be found on page 328, section 8, of the Revised Code of 1825. It is in these words:

"When a man, having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him as his, shall be thereby legitimated," etc.

It is well known to the profession that this enactment is borrowed from the civil law, and is the same provision which was repudiated in the memorable language of our English ancêstors at the Parliament of Merton. It defines the conditions on which bastards may be legitimated, in very unambiguous terms. If Zachariah Wilson, having a bastard child by Jane Collins, had afterwards intermarried with her, and acknowledged the child as his, the statute would have been complied with. But, from the lips of Jane Collins, we have the assurance that no such marriage ever took place, and that is the end of the matter. It is idle to talk of presumptive evidence when we can appeal to direct testimony; idle to speculate as to the more or less plausible nature of the probability afforded by subsequent cohabitation, repute, etc., in the absence of direct and primary evidence. The conclusive answer to suggestions of this kind is that the direct, primary, and unanswerable evidence is *not* absent. It is here, and it is conclusive. Jane Collins, called in this record Jane Wilson, was examined by the plaintiff. She spoke with every appearance of truth and candor, and gave no sort of support to a theory which she must have known that her grandchildren were interested in upholding; on the contrary, she demolished it completely.

This is decisive of the controversy. If Cynthia Elizabeth could not show herself to be the heir of Zachariah Wilson, of course her children cannot, and the case is at an end. All this appeared by the testimony of the plaintiffs, and the defendant should not have been called on to vindicate his possession.

With the concurrence of all the judges, the judgment is affirmed.

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CATHERINE H. COCKER, Respondent, v. JOHN COCKER, Appellant.

June 10, 1876.

1. A and B were co-executors of C. Money came into the hands of A, which he temporarily committed to B, taking his note, by which B promised to pay the amount to A, with interest. *Held*, that in a suit on the note it was no defense that the money belonged to the estate of C.
2. If interest be paid within ten years on a note which had been due for more than that period, the bar of the statute of limitations is thereby avoided.

APPEAL from St. Louis Circuit Court.

Affirmed.

Dryden & Dryden, for respondent, cited: Edmons *et al.* v. Crenshaw, 14 Pet. 166; Lawrence v. Lawrence, 3 Barb. Ch. 71; Abila v. Bennett, 33 Cal. 667; Hope v. Jones, 24 Cal. 92; Daly's Estate, 1 Tuck. Sur. 95.

Seymour Voullaire and *Sternberg & Morris*, for appellant, cited: Carr v. Dings, 58 Mo. 400.

GANTT, P J., delivered the opinion of the court.

This action was commenced to the December term, 1871, and, on October 26, 1872, an amended petition was filed stating the making by defendant to the plaintiff, on December 31, 1860, of a note for $655; that the interest thereon was paid up to February 17, 1865, and that the principal, with interest from that date at the rate of 10 per cent. per annum, was due.

The answer denied indebtedness; denied that defendant had paid interest up to February 17, 1865; denied all payments on said note; alleged that in 1858 Abraham Cocker died at Kankakee, Illinois, leaving a will by which he devised and bequeathed to the plaintiff (his wife) and to the defendant (his son) all his real and personal estate upon trust that they would, immediately after his decease, convert the same into money, pay his debts, and apply the residue as therein directed; that he gave to plaintiff one-

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third of all his estate, real and personal, during her natural life, and, at her decease, such share should belong to her unborn child; * * * and, should all the children of said plaintiff by testator die, then one-sixth part of said property should descend to his granddaughter, Amelia Ball; and the residue be divided between his sons, John and James, and his daughter, Elizabeth, equally. To his said granddaughter, Amelia Ball, he gave $150 on her reaching the age of twenty-one years; to John he gave three-eighths of his estate; the residue to James and Elizabeth, equally; and he appointed John and Catherine executors of his will. By a codicil he appointed plaintiff and defendant trustees of the trusts of his will; that defendant alone resumed the duties of trustee, and was then performing the same; that plaintiff and defendant became executors; had not made final settlement of the estate; that the net balance of the estate was $10,501.80. Defendant cannot state the precise amount, because plaintiff has collected money and made no final settlement thereof; that, for many years, he has estimated the value of plaintiff's interest in the estate of Abraham Cocker at the interest on $3,500 annually; that plaintiff collected money to the estate of Abraham Cocker belonging, and handed over $655 thereof to defendant on December 31, 1860, as trustee and in his representative capacity, and not in his individual capacity; that since then said money has already been treated by them both as part of the estate; that this, and no other, was the consideration of the note; that, on final settlement, plaintiff will be largely indebted to the estate of Abraham Cocker.

For another defense he alleged that there was another action pending between the same parties for the same cause of action in this court; and, for another defense, that the cause of action did not accrue within ten years.

For reply plaintiff denied that the only consideration of the note was as stated in the answer; admitted it to be

true that Cocker died, leaving a will whereby, among other things, he declared that plaintiff and defendant should be answerable each for his or her respective acts, receipts, and defaults, and should be at liberty to retain and allow to each other, out of moneys coming to their hands by virtue of said will, all expenses incurred in executing the trusts thereof; that he gave to plaintiff one-third of all his property during life, remainder to her unborn child; and, in case of the death of such child, then to any other child of plaintiff by testator; or, on failure of such issue, one-sixth thereof to go to his granddaughter, Cordelia Amelia Ball, and the residue to his sons, John and James, and his daughter, Elizabeth (stating the will as the defendant had); and plaintiff denied that defendant alone assumed and entered upon the duties of trustee under said will, or is now acting as sole trustee thereof; denies that, after paying all debts and expenses, the net value of the estate was only $10,501.80; avers that it was about $18,500; that of this money all but about $1,100 was received by defendant, and is retained by him (except about $3,000 paid to legatees other than plaintiff), and used for his own private gain; denies that under said will plaintiff is entitled to only the annual income of one-third of said estate, or that the one-third has been estimated by plaintiff and defendant at $3,500 only; that she is entitled to one-third of the whole estate, which gives her at least $5,000; admits that, prior to December 31, 1860, she collected a large sum of money belonging to the estate of Abraham Cocker, whereof she handed to defendant $655; did not give it to him as co-trustee, nor did he receive it as such; but she paid, and he received, it as her own money to her individually belonging—it having been so declared by the County Court of Kankakee county, Illinois—and defendant has full credit on account of such collection; that the said sum of $655 never has been treated by her, or by defendant, as part of the assets of the estate of Abraham Cocker; denied the pendency of another action for the same cause;

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and says it is not true that plaintiff's cause of action did not accrue within ten years before the commencement of this suit, or that it is barred by limitation.

The case was tried before a jury in October, 1874, and here was a verdict for plaintiff.

The note sued on was in these words:

"$655. *Kankakee City, Illinois, December 31, 1860.*

"I promise to pay Catherine Cocker, or order, $655, with ten per cent. interest per annum until paid out, for value received. "John Cocker."

On which was indorsed the following memorandum:

"Interest paid to date in full. February 17, 1865.

"Catherine H. Cocker."

There was evidence tending to show that, in 1860, there had been a settlement of the estate of Abraham Cocker; that some of the money belonging to it had been collected by defendant and some of it by plaintiff; that plaintiff was a legatee of Abraham Cocker; that all the money which came into her hands was accounted for in the account filed in the County Court of Kankakee county, Illinois, the day the note sued on was given; that there was a sum of nearly $800 coming to plaintiff as legatee; that of this she lent $655 to defendant, and took therefor the note sued on in this action; that all interest thereon, up to February 17, 1865, had been paid, and that nothing had since been paid thereon. On February 17, 1865, plaintiff had, in the presence of defendant, indorsed upon the note a memorandum of the payment of interest up to that date; that defendant borrowed this money to enable him to pay for land in St. Louis, and did so pay it. There was also evidence on the part of defendant tending to show that, prior to December, 1860, plaintiff and defendant had estimated the value of the estate of Abraham Cocker, and that he agreed to pay her interest on the sum of $3,500, at 8 per cent., as her share of the estate, and that he had, for sometime prior to the bringing of this suit, paid her such interest, and that this note was part of the sum of $3,500. There was evidence

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on the part of plaintiff that such interest had been so paid, but that the note sued on was a separate and unconnected matter, and that she did not estimate her share of the estate at so low a figure as $3,500. There was no evidence to sustain the allegation of another action pending for the same cause; and, on the question of the payment of interest on the note up to February 17, 1865, the evidence was conflicting—that is, the testimony of plaintiff and another witness, together with the memorandum on the note, admitted by defendant to have been made at the time, were opposed to the testimony of defendant on this subject.

Upon the evidence the court instructs the jury:

1. "The court instructs the jury that there is no evidence before them to sustain want of consideration firstly set up in defendant's answer, and as to that defense they must find for the plaintiff."

2. "That there is no evidence before them to sustain the defense secondly set up in defendant's answer, and as to that defense, therefore, they must find for plaintiff."

3. "That if they believe that, at any time before the expiration of ten years from the time the note sued on was due and payable, the defendant paid to the plaintiff any part of the principal or interest upon said note, and that, at the commencement of this suit, ten years had not elapsed since the making of said payment, then, as to the third defense of the statute of limitation, they should find for the plaintiff."

4. "That the defendant, by his answer in this case, has made no claim of payment of any part of said note, at any time, and by the petition and reply it is not admitted that any part of it, except interest to February 17, 1865, has been paid; wherefore, in assessing the damages, they must, if they find for the plaintiff, compute interest on the note from February 17, 1865, at ten per cent. per annum, and

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disregard all evidence as to payments of interest applicable to this note."

On the part of defendant, the court instructed "that the burden of proof was on the plaintiff to show that defendant paid some interest or principal on the note before it had been ten years due, and that ten years had not elapsed since the payment, in default of which plaintiff could not recover."

The court refused the following instructions:

1. "If the jury believe from the evidence that the $655 received by the defendant December 31, 1860, at the time the note sued on was executed, was the only consideration for said note, and further find that this sum was part of, and belonged to, the estate of A. Cocker, plaintiff could not recover."

2. "That if they believe from the evidence that the money paid over to defendant on December 31, 1860, was money belonging to the estate of A. Cocker, deceased, the plaintiff could not recover."

3. "That, if they find for plaintiff, in estimating her damages they will deduct any money paid by defendant to plaintiff upon said note, as a part of the gross sum of $3,500, estimated to be plaintiff's interest in the estate of A. Cocker, if they further find that parties did make such an estimate, and that said note was included in said gross sum."

4. "No action on the part of the parties to this suit, or the County Court of Kankakee county, Illinois, could divest the funds of Abraham Cocker's estate so as to give plaintiff absolute possession, control, or ownership of any part of said estate, contrary to the provisions of the will of Abraham Cocker."

5. "That the only interest plaintiff has in the estate of Abraham Cocker is such interest as is given her by the will of said Abraham read in evidence; that, under said will,

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plaintiff's interest is a life-interest in one-third of said Abraham's estate remaining after the payment of his debts, funeral, and testamentary expenses, and that, upon the death of the plaintiff, such one-third is to be distributed as provided by said will."

1. The theory of the defendant would deprive either of the executors of any right to the absolute possession and control of the funds of the estate of their testator, for, if the plaintiff had no right to these funds, as little could such right vest in the defendant.

If of two executors, A and B, one of them, A, collects a sum of money belonging to the estate of the testator, he holds it for the trusts indicated by the will or the law. He cannot exonerate himself from the obligation to apply it to the discharge of these trusts by turning it over to his co-executor. If he does this, and his co-executor wastes the fund, he remains liable. This is elementary law. The cases cited by respondent's counsel prove it with superfluous rigor.

It follows that A, receiving the money of the estate, is entitled to it as such executor—that is, has the ownership of it coupled with, and subject to, the condition of accounting for it according to the terms of the will and the statute. If, under these circumstances, the money be temporarily placed in the hands of C, a stranger, who agrees to receive it, pay interest for it at a stipulated rate of interest, and, finally, repay the principal, this is a valid contract between such executor and C. The other executor, B, being a stranger thereto, cannot discharge this contract or enforce it. If, by entering into it, A has committed a *devastavit*, his estate and that of his colleague, as well as that of their sureties, must answer it. These are the liabilities incurred by a joint executorship and a joint bond—which is the case most favorable to the argument of the appellant.

If, instead of A lending the money to C, he selects B as his bailee, no reason is perceived why, in respect of the

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ascertained sum, a valid contract, such as was contemplated by the note in this case, cannot be made. The note in this case is perfectly explicit. By placing the money in the hands of defendant, plaintiff certainly incurred a risk, and perhaps violated her duty as executrix, for she knew that defendant was about to apply the money to his own use. It would be monstrous, however, to permit him to take advantage of her good nature to prevent her recovering back from him the money he agreed to pay. The form of the note does not suggest an idea on the part of maker or payee that their relations as executor and executrix were involved in the transaction, and we do not think that they could be shown to be. These considerations dispose of the first two defenses set up in the answer, and leaves, as the only remaining controversy, the issue under the plea of the statute of limitations.

2. On this point the matter of fact to be inquired of by the jury was the payment of interest within ten years before the institution of the suit, and before the bar of ten years from the maturity of the note had become complete. The instructions given by the court on this head were carefully guarded, and appellant cannot complain of them.

For these reasons the judgment must be affirmed. But we remark that, but for the fortunate circumstance that only one issue remained for the consideration of the jury, to wit, that of limitations, great danger of a reversal—not upon the merits—would have been incurred by the *form* of the first and second instructions given at the instance of the plaintiff. The jury were told that the first and second defenses set up by the answer are not supported by evidence.

If the jury had thereby been sent to the answer to ascertain what these defenses were, and there had been the faintest possibility of their failure to construe the pleadings correctly, it might have been our disagreeable duty to reverse and remand this cause. It is the duty of the *nisi prius* court to tell the jury what are the issues to be tried by

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them; and it is error to refer them to the pleadings for this information. *Butcher* v. *Death & Teasdale*, 15 Mo. 270. We consider this error cured by the other instructions and the nature of the record, and, hence, we only call attention of counsel to it in order, first, that it may not be supposed that we have overlooked it; and, secondly, that any approach to it may be avoided in future. In the present case we think the jury were substantially informed that the controversy turned on the plea of the statute of limitations, and that appellant was not injured by the language of the first and second instructions.

3. To exclude a conclusion which the appellant urges with much zeal, we say that we decide nothing as to the trusts to which the respondent will hold the money recovered in this action when appellant has paid it to her. All questions of that kind are premature, and, therefore—although we really are unable to perceive in what manner the trusts impressed upon a fund can be supposed to be avoided by shifting the fund from one hand to another, and finally getting it back into the possession of the person who was charged with the execution of the trusts—we think it better to leave untouched, for the present, all considerations of such consequences. If the appellant is interested in the manner the respondent should discharge any such trust, nothing in the present record will preclude his holding her to account for the money which, by the affirmance of this judgment, he in his individual capacity is ordered to pay to her in her individual capacity.

All the judges concur in this affirmance.

MRS. JOSIAH L. WARNER, Respondent, v. JAMES M. VEITCH, Appellant.

June 19, 1876.

1. Where one having a judgment which is a lien on real estate suffers the property to be sold under a deed of trust which was a prior lien, without

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getting out execution on his judgment, and the trustee under the deed of trust pays the surplus in his hands, after satisfying the notes, to the grantor in the deed of trust, the judgment creditor cannot recover in an action against the trustee, though he had notice of the judgment.

2. Where the land is sold under a prior incumbrance, the lien is gone.

APPEAL from St. Louis Circuit Court.

Reversed, and final judgment.

Dryden & Dryden, for appellant cited: Pahlman *v.* Shumway, 24 Ill. 127; Purple Ill. Stat. part 1, p. 642, sec. 1; Wag. Stat. 790, secs. 1, 2, 3; Douglass *v.* Houston, 6 Ohio, 162; Miami Bank *v.* Turpin, 3 Ohio, 517; Conrad *v.* Atlantic Ins. Co., 1 Pet. 443; Massingill *v.* Downs, 7 How. 767; McMahon *v.* Allen, 34 Barb. 56; Morrison *v.* Deaderich, 10 Humph. 342; Dunberry *v.* Talmage, 32 N. Y. 459–461; Story's Eq. Jur., sec. 1, p. 266; Brangling *v.* Barington, 6 B. & C. 475.

Chandler, Young & Burnett, for respondent, cited: Grant *v.* Whitewell, 9 Iowa, 157; 3 Bouv. Inst. 61, 66; Succession of Walsh, 9 La. An. 543; Anderson *v.* The State, 23 Miss. 475; Rankin *v.* Scott, 12 Wheat. 179.

BAKEWELL, J., delivered the opinion of the court.

This is a proceeding in equity to recover from defendant certain moneys, surplus remaining in his hands after foreclosure of a deed of trust of which he was trustee.

It appears from the pleadings and evidence that, on January 23, 1871, one Everett conveyed to Veitch a certain lot in St. Joseph, Missouri, on which Everett was then residing with his family. This conveyance was in trust to secure to the Covenant Life Insurance Company the payment of a note of $3,000 therein described, and contained the usual provisions for sale on default of payment. The deed contains the customary clause that the surplus, in case of sale, should be paid to the grantor, or his legal representatives. On May 31, 1871, Philemon Bliss recovered judgment in the Circuit Court of Buchanan county, against Everett, for $899 and costs. This judgment was a lien upon the real estate mentioned in the deed of trust, and next in priority.

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This judgment was duly assigned to plaintiff. On June 1, 1872, Everett executed to one Saxton a mortgage upon the same lot of ground, to secure to him an indebtedness of $1,711. Both of these instruments were duly recorded as soon as delivered. On September 10, 1873, whilst the judgment and mortgage were unpaid, default having been made in the payment of the note secured by deed of trust, the same was foreclosed according to its terms, and, after paying the debt described in the deed, there remained in the hands of the trustee $1,710.52. At the time of the sale the defendant, the trustee, had notice of the judgment owned by Mrs. Warner, and after the sale, and whilst the surplus was still in defendant's hands, the owner of the judgment demanded of defendant to apply so much of said surplus as was necessary to the payment of her judgment. This, defendant refused to do, and, upon the order in writing of Everett, the grantor, paid said surplus to Saxton, on account of his mortgage. An execution was issued on the judgment just prior to the trust sale, and was, at the date of the sale, in the hands of the sheriff of Buchanan county. Soon after the sale, Everett surrendered possession to the purchaser. Everett was then, and is now, insolvent. Defendant avers that Everett had a valid homestead in the property conveyed by deed of trust, subject to the lien of that deed, at the time of the sale. This is denied by plaintiff.

Plaintiff prays for a decree that defendant pay her, out of the said proceeds of sale and surplus, the amount of her judgment and interest.

The court, at the conclusion of plaintiff's case, refused an instruction that she was not entitled to recover, made a special finding of facts, and gave judgment for plaintiff.

Motions for a rehearing and a new trial, filed by defendant, having been overruled, the cause is brought here by appeal.

Judgments in this State are made by statute liens upon

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the real estate of the defendant. The lien of the judgment does not extend to personalty. A person to whom land has been conveyed subject to a deed of trust, or the *cestui que trust* where the conveyance is a second deed of trust, becomes thereby the legal representative of the grantor, and, as such, is entitled to receive the surplus funds remaining after the foreclosure. *Reid* v. *Mullins*, 43 Mo. 306. We are, therefore, of opinion that the money in this case was rightly paid to Saxton, and the plaintiff is not entitled to recover.

We are told by counsel for plaintiff that, where there are several liens upon a tract of land and it is sold under one of them, the property, after paying the lien under which it was sold, belongs in equity to the next subsequent liens, in the order of their priority. *Strawbridge* v. *Clark*, 52 Mo. 21. And we are referred to Missouri cases in support of this view; but an examination of these cases does not establish this doctrine. The lien to which this rule is applied will be found, on examination, to be a lien created by deed giving an interest in the land. Neither in law nor equity does the statutory lien of a judgment follow the surplus produced by a sale of land under a preëxisting deed of trust.

"A general lien by judgment on land," says Judge Story, in *Conrad* v. *Atlantic Insurance Company*, 1 Pet. 443, "does not constitute *per se* a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment; and, when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor, and even against him unless he consummate his title by a levy on the land under his judg-

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ment. In that event the prior levy is, as to him, void, and the creditor loses all right under it. The case stands, in this respect, precisely on the same ground as any other defective levy or sale. The title to the land does not pass under it. In short, a judgment creditor has no *jus in re*, but a mere power to make his lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of the vendor or vendee, or to claim the purchase money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can take the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds at the sale of the land when it has been sold on his own execution, and ought to be applied to its satisfaction." Or, we may add, if sold under another execution, follow the proceeds by the process of garnishment.

The same rule is laid down in well-considered cases in Ohio, Illinois, and other States. Equity will not aid the lien where it fails at law. The existence of the lien, and the method of enforcing it, are matters purely legal.

To make her lien available, Mrs. Warner should have enforced it by a levy and sale of the equity of redemption. But she suffered it to be sold to satisfy a prior incumbrance. The sale converted the land into money. Had she summoned the trustee as garnishee, she might have had the benefit of her lien and have held the fund, but, not having done so, he acted in accordance with law in obeying the written instructions of Everett, and paying over the money to the holder of the second mortgage.

The judgment of the Circuit Court is reversed, with the

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concurrence of all the judges; and, as all the facts are before us, it is our duty to give final judgment here for the defendant, which is accordingly done.

SARAH M. EOFF, Plaintiff in Error, *v.* CORNELIUS TOMPKINS *et al.*, Defendants in Error.

June 19, 1876.

1. A devisee cannot maintain ejectment against a tenant of the executor, under a leasing order of the Probate Court, while the estate remains unsettled.
2. A man may freely dispose of his property while he lives, but at his death the law takes it in charge, and subjects his testamentary dispositions to the prior claims of creditors.
3. Rents collected by an executor or administrator are assets of the estate.

ERROR to St. Louis Circuit Court.

Affirmed.

John Burke, for plaintiff in error, cited: 38 Mo. 489; 52 Mo. 118, 119; 11 How. Pr. 11; Burdyne *v.* Mackey, Exr., 7 M. R. P. 374; Aubuchon *v.* Lory, 23 Mo. 99; Chamber's Admr. *v.* Wright's Heirs, 40 Mo. 482; Bagnall *et al.*, 13 Pet. 447; State *v.* Metzger, 26 Mo. 95; 43 Mo. 196; 45 Mo. 289; Hall's Heirs *v.* Hall, 47 Ala. 290.

Farish & Griffin, for defendants in error.

LEWIS, J., delivered the opinion of the court.

Plaintiff, as devisee under the will of Catherine D. Long, deceased, instituted this suit in ejectment to recover possession of a lot occupied by defendant Tompkins, as tenant under Isaac Bushell, the executor, who was subsequently made a party defendant. It appeared from the pleadings and evidence that the estate of the testatrix was still unsettled; that a large claim was in suit against it, which, if sustained, would render the estate insolvent; and that the

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executor had leased the real estate under an order of the Probate Court. It also appeared that the lot in controversy was bequeathed to plaintiff by the testatrix. Upon this state of facts the court, sitting as a jury, rendered judgment for the defendants. This judgment was affirmed in general term, and the cause is brought here by writ of error.

In the case of *Gamage* v. *Bushell*, decided by this court at the present term, the attempt was made, by another devisee under the same will here before us, to recover from the executor the amount of rents received by him from the property devised to the plaintiff. The testimony, so far as it affected the chief matter of controversy, was substantially the same as in the present case. It was held that the devisee had no claim upon the rents and profits of the land so long as the estate remained unsettled, with an indebtedness, real or supposed, still hanging over it, and no order yet made by the Probate Court for a delivery of the real estate, by the executor, to the parties entitled thereto. The principles declared in that decision are conclusive of the present controversy.

So long as a man lives, he may dispose of his property as he pleases, being subject only to such restrictions as creditors or others may impose by specific methods which the law prescribes; but when he dies the law takes it all in charge, and systematically enforces the claims of justice before those of generosity. Our statutes provide for the absolute sale of a decedent's real estate to pay his debts, notwithstanding any different disposition he may have sought to make by last will or testament. They direct (Wag. Stat. 89, sec. 48) that "executors and administrators, under the direction of the court, shall lease the real estate for any term not more than two years, and shall receive and recover rents." Such an authority for leasing is manifestly incompatible with any claim of an heir or devisee to immediate possession. The order may be made and repeated at any time during the progress of administra-

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tion. The rents so collected are necessarily assets in the hands of the executor or administrator, as is shown in the case of *Gamage* v. *Bushell*, above referred to. The next section provides that, "whenever the court shall be satisfied that any real estate need not be sold or leased for the payment of debts of the estate, the executor or administrator shall be ordered to deliver possession of the same to those entitled to it." If any person prospectively entitled to the real estate may lawfully obtain possession before any such conditions shall become apparent, or any such order shall be made, then the provision last quoted is a mere waste of words. The manifest intent is that the real estate, after an order for leasing, shall remain in the hands of the executor or administrator, or his tenants, until the specified contingency shall arise which is to authorize a change of possession.

We find no substantial error in the record, and must affirm the judgment. Judge GANTT concurs; Judge BAKEWELL, of counsel in the court below, not sitting.

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ARCHIBALD CARR, Respondent, *v.* HIBERNIA INSURANCE COMPANY, of Ohio, Appellant.

June 19, 1876.

1. Property insured was described as being in a two-story brick building, No. 1444 Broadway. The front part of the building was two stories high, and the rear one story only. The property was partly in the front and partly in the rear part of the building. A fire originated and destroyed the property in the rear. *Held*, that there was no misdescription of the *situs* of the property.
2. The insurance policy issued by defendant contained a provision that the policy should be void if the assured had any other insurance, and did not notify defendant thereof, and have the fact indorsed on the policy. The assured had other insurance, no such indorsement being made, but the defendant's agent knew of the fact, conferred with the agent of the other insurer, before the issue of the policy, as to the proportions of risk each

should take; the risk was divided, and the policies made out according to the result of the conference. *Held*, that the defendant was estopped to object to the want of a formal notice and indorsement.

3. A verdict for damages which is demonstrably excessive will be set aside.

APPEAL from St. Louis Circuit Court.

Affirmed.

Fisher & Rowell, for appellant, cited: Todd *v.* Germania Ins. Co.; Lubenstein *v.* Ætna Ins. Co., 45 Ill. 303; Moadinger *v.* Mechanics' Ins. Co., 2 Hall, 490; Tesson *v.* Atlantic Ins. Co., 40 Mo. 33; Hutchinson *v.* Western Ins. Co., 21 Mo. 97; Deitz *v.* Mound City Ins. Co., 38 Mo. 93; Barrett *v.* Union Ins. Co., 7 Cush. 175; Lee *v.* Howard Ins. Co., 3 Gray, 583.

E. W. Pattison, for respondent, cited: Hayward *v.* National Ins. Co., 52 Mo. 181; Pelkington *v.* National Ins. Co., 55 Mo. 172; Russell *v.* State Ins. Co., 55 Mo. 585.

GANTT, P. J., delivered the opinion of the court.

Carr sued the defendant to the April term, 1874, of the St. Louis Circuit Court, alleging the issue, on June 26, 1873, of a policy insuring plaintiff against loss by fire to the amount of $300 on ovens; $300 on stock of flour, butter, and materials for making bread; $400 on tools, fixtures, counter, shelving, and show-cases; the same being contained in a two-story brick bakery known as 1444 Broadway, in the city of St. Louis, Missouri. The petition proceeded to declare that "all of the property above mentioned and described" was destroyed by fire on November 20, 1873, and that due proof of loss was made, etc.

The answer denied that it insured against loss by fire the property in the petition described. It admitted the execution of the policy, but alleged that it was void because the plaintiff did not have the property in the petition mentioned at the place described therein. It denied that said property was destroyed, denied its value, denied notice of loss, and denied the performance by the plaintiff of "all the conditions of said policy on his part to

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be kept and performed." The answer then alleged that it was one of the conditions of the policy that, if the assured had any other insurance on the property, not notified to the defendant and mentioned in, and indorsed on, the policy, then the policy should be void; that plaintiff did have other insurance whereof defendant was not notified; and the same was not indorsed on the policy, or mentioned therein; wherefore, etc.

Also, that it was provided in and by said policy that, if the plaintiff should thereafter make any further insurance, he would with all diligence give notice thereof to defendant; that plaintiff did afterwards effect other insurance, and did not notify defendant, etc.

The reply admitted that, when the policy was effected, there was other insurance, but alleged that defendant was thereof fully notified at the time; and denied any subsequent insurance.

There was a trial in March, 1875, and a verdict was given for plaintiff, in the sum of $650, which the court refused to set aside. By the bill of exceptions it appeared that, in June, 1873, the plaintiff, at the request of one LeBaum, who was soliciting insurance for the defendant, agreed to divide with defendant and the company of which a Mr. Morrison was agent the amount of his insurance. He caused LeBaum to confer with Morrison. Negotiations had been already pending between plaintiff and Morrison for the whole of plaintiff's insurance, which was $2,500. It was arranged between Morrison and LeBaum that Morrison's company should issue a policy for $1,500, and defendant for $1,000. This agreement was executed. Plaintiff received his policy from LeBaum, and paid him the premium, for which LeBaum duly accounted with the general agent of defendant, whose name was Hickey. No other policy was taken out by plaintiff except these two. Objections were saved to the proof, by the statements of LeBaum, of the terms on which he was employed by Hickey. The

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Circuit Court very properly admitted this proof. In like manner evidence was properly admitted of what passed between LeBaum and plaintiff, of the full knowledge had by LeBaum of the dealing of plaintiff with Morrison, and of what was said by Hickey respecting the proof of loss after the fire. It was shown that the property destroyed was in the back part of No. 1444 Broadway. The front of the building was two stories high; the back part, where the store-room and bakery were, was one story. All these parts constituted one building; there was no open space between the parts, only glass doors.

The evidence of the extent of the loss was furnished by the testimony given by Carr at the trial, and by the statements of loss which he made out soon after the fire. At the trial he said, "I think the total loss of all my fixtures and stock amounted to between twenty-five and twenty-seven hundred dollars." On cross-examination he said, "I think my proof of loss was made out stating my loss to be a little over six hundred dollars." "I say now it was between twenty-five and twenty-seven hundred dollars, *because, in making up proof of loss, discount was allowed.* It was a total loss to me. I claimed more than six hundred dollars in my proof of loss. I would know the proof of loss. I swore to it. I made the schedule of the loss attached to it." The paper being shown to him, he remarked that the loss he claimed was something more than $600; was to be divided between the two companies, and the proportion charged against the defendant was $352.25. In the schedule, he claimed against the defendant $25 on account of damage to the oven. He persisted at the trial in saying that what he had sworn to in making proof of his loss, soon after the fire, was true; and that the loss of his ovens, his flour and materials—except about three sacks of flour—his fixtures and furniture in his back shop, was total; and that it amounted to between $2,500 and $2,700.

The policy set forth that the defendant, in consideration

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of $20, insured plaintiff against loss by fire to the extent of $300 on his ovens; $300 on his stock of flour, butter, and other materials for making bread; and $400 on his tools, fixtures, shelving, show-case, etc.; all contained in a two-story brick bakery known as No. 1444 Broadway, for the term of one year from June 26, 1873; with a proviso that, if the assured had already another insurance upon the property, not notified to this underwriter, this policy should be void, or, if he should effect any future insurance thereon, and fail to notify the underwriter thereof with all reasonable dilligence, this policy should be void; and in case of any other insurance, prior or subsequent, the assured should be entitled to recover of this underwriter no greater proportion of the whole loss or damage sustained than the amount hereby insured should bear to the whole amount insured upon said property.

The policy issued by the National Insurance Company, apparently upon the same property, was for $1,500 in all; $500 on the ovens; $500 on the flour, butter, etc.; and $500 on the furniture, shelving, and show-cases.

The case was given to the jury under the following instructions, asked for by the plaintiff:

"If the jury find for the plaintiff, they will assess the damages at such sum as will indemnify him for the loss sustained on the property insured, not exceeding one thousand dollars; and, if they further find that payment has been vexatiously delayed by the defendant, they may assess a sum as additional damages, not exceeding ten per cent. on the amount of the loss.

"If the jury believe that the agent of defendant knew, at the time of the application of plaintiff for insurance, that plaintiff had already taken out insurance on the same property in another company, or was then taking out such other insurance, and with such knowledge delivered the policy to plaintiff, defendant cannot now set up such other insurance as a defense to the policy."

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Of its own motion the court gave the following instruction:

"The court instructs the jury that, before the plaintiff can recover in this case, he must show that he gave defendant, or its duly authorized agent, notice of the existence of the other insurance upon the property in question, in the National Insurance Company, of Philadelphia, or that defendant, by itself or agents, received such notice. Such notice, however, need not have been formal, and the requirement of notice would have been satisfied by the existence of a state of facts which brought to the knowledge of the agent of defendant the fact of the prior insurance, if the jury find that such facts have been established by the evidence."

To the giving of these instructions defendant excepted.

The defendant asked several instructions on the subject of the effect of other insurances not disclosed to the defendant, or not formally entered upon the policy held by plaintiff. These the court refused, defendant excepting. The defendants also asked several instructions—how many, we are not told—which the court gave, but these are not shown by the bill of exceptions. Obviously, we should be unable to criticise the propriety of refusing the instructions which the court declined to give, even if each one of them declared an undeniable proposition of law applicable to the facts of the cause; for it would still be consistent with all that we can know that the instructions given embodied the same rules of law in better, or equally good, phraseology. Every presumption is in favor of the correctness of the action of the Circuit Court, and the party who alleges error must show it affirmatively.

The other points relied on for a reversal of the judgment are:

1. That the court did not properly construe the policy in refusing to rule that the property insured and damaged was not in a "two-story brick bakery."

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2. That the court erred as to the necessary notice to be given of other insurance upon the same property.

3. That the damages were excessive, and were assessed by the jury, under the instructions of the court, without regard to the other insurance on it.

1. The appellant's counsel earnestly insist that the policy had reference to no property in the rear or back part of the building No. 1444 Broadway, because—the property being described as in a two-story brick building, and that part of the building containing the property being of one story only—there was a plain and material variance between the thing insured and the thing destroyed. We cannot accept this criticism. It is the familiar custom to describe a building as of one story, two stories, three stories, etc., according to the height of the front or principal portion of it. Ninety-nine times in the hundred, the height of the front is greater than that of the rear of all but those buildings of modern construction which are exclusively devoted to business. In nearly every dwelling, in this or any other American city, there are parts the height of which is materially less than that of the principal mansion. Sometimes, while the number of stories is the same, the height of each story is less. Sometimes, and usually, the number is lessened, as well as the height of each one of the number. Yet no one supposes that such a building, which in front may have four stories and in the rear only two, is improperly described as a four-story house, and as little can it be doubted that it is *all one house*. We think the plaintiff's bakery was properly described as being a "two-story brick bakery," and we should be of this opinion even if the rear part, the height of which was one-story only, had been composed of wood in greater proportion than the front part, which, however, does not seem to have been the case. If, indeed, any deception had been practiced on the defendant in respect of the nature or material of the building containing the insured

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property, a very different question would have been presented. But we have nothing to do with hypothetical cases.

The case to which we are referred in 45 Ill. 301, 303, 305, so far from sustaining the views contended for by appellant's counsel, are liable to be quoted in opposition to them. There the court held that a policy not materially different from that shown by this record covered, not only property in the building described, but in a separate building used in connection with, but not actually contiguous to, the first. Here all the property was absolutely and emphatically in the *same* building. It was so described in the policy, so described in the petition, and so proved by the witnesses. The case of *Todd* v. *Germania Insurance Company*, decided by us at this term, is cited by appellant as authority for holding the petition and evidence to be fatally inconsistent. If counsel will read the opinion in that case, they will discover its inapplicability to the present. There is no possible doubt as to the proposition that property described and insured as being in one house, if removed to another house, and there destroyed by the peril insured against, is in fact uninsured. But, if it be insured as being in premises called A, and if it be demonstrated that is was really there when destroyed, we cannot see what advantage is gained to the underwriter by the establishment of the proposition that, if the property insured as being in one place is actually in a different place when destroyed, the insurance will be vitiated.

2. The instructions given by the Circuit Court, in relation to the requirement of notice to the defendant of existing or subsequent insurances, were in perfect harmony with the later rulings of the Supreme Court of the State of Missouri, the Supreme Court of the United States, and of many other tribunals of the highest authority. We have no occasion, of course, to look beyond the rule laid down by the Supreme Court of Missouri. *Pelkington* v. *National Ins. Co.*, 55 Mo. 172; *Russell* v. *State Ins. Co.*, Ib. 585; *Hayward* v. *National Ins. Co.*, 52 Mo. 181; *Horwitz* v. *Equit-*

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able Mutual Ins. Co., 40 Mo. 557; "The Distilled Spirits," 11 Wall. 356. The case of *Hutchinson* v. *Western Insurance Company*, 21 Mo. 97, cited by appellant, has been repeatedly and pointedly overruled. See 52 Mo. 195. We do not deem it necessary or becoming in us to go over ground so lately illustrated by our own Supreme Court, and we content ourselves with saying that the views thus expressed are not only binding on us as an authoritative exposition, but that, independent of this sanction, they command the full concurrence of our reason.

3. There is more difficulty as to the amount of the damages assessed by the jury, and the rule by which they were led to make that assessment. Certainly, anything more incongruous than the statements made by the plaintiff in November and December, 1873, and in March, 1875, on the subject of the loss he had sustained by the fire, is seldom witnessed. He made two statements of his loss; the first was made on November 24th, the second on December 20, 1873; the fire having occurred on November 20th. In his first statement he alleged that the total value of the property insured was $3,000, and that the damage by the fire, of which he furnished a bill of particulars, was $616.25, of which he claimed $311.11 from the defendant. In the second statement—which is called "additional proofs of loss," not "proofs of additional loss"—he sets down the total loss at $705.40, of which he claimed $352.55 from defendant. It appears that he settled with the National Insurance Company, of Philadelphia, for $315. It will be remembered that he was insured in the sum of $1,500 in that company, and the sum of $1,000 in defendant's. Of course, if his whole loss was $705.40, of which he received from the National Insurance Company $315, the remainder only (leaving out of view all questions of accuracy of the apportionment of the loss between the two companies), or $390.40, was recoverable from defendant. If the apportionment had been made of this loss between the two

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companies according to the terms of defendant's policy, it would appear that the defendant was bound to pay of every $5 lost $2, and the National Insurance Company $3. This would make $423.24 of the last amount proved up, which was $705.40, payable by the National Insurance Company, and $282.16 payable by the defendant. But, dividing the loss between them ever so arbitrarily, we are unable to see how defendant could, under the evidence, have been charged with more than $390.40 of principal money. No legal rate of interest, and no legal penalties, could have swelled this sum to $650 on March 9, 1875. Yet this was the verdict given by the jury on that day, and the court permitted it to stand, notwithstanding the suggestion that the damages were excessive. Was there anything in the instructions of the court that might have led the jury to give this excessive sum? We think there was. They were told that, "if they found for the plaintiff, they must assess the damages at such sum as would indemnify him for the loss sustained on the property insured, not exceeding one thousand dollars," etc.

No reference is here made to the insurance, or the money paid, by the National Insurance Company. The court had evidence before it that plaintiff had received $315 from that company on account of this loss, and, when the learned judge spoke of the indemnity which plaintiff was to recover, he should have reminded them of this partial satisfaction. If the property lost was insured in both companies, we find it difficult to understand how the defendant could, under its agreement with plaintiff, be liable for so much as half the loss. But, at lowest, it was only liable for so much of the loss as remained unpaid by the other underwriter. If the plaintiff collects the whole of this judgment, he will have treated his two underwriters very differently. We cannot see a justification for a discrimination so marked. Because the damages are excessive, and because the instruction of the court was calculated to lead the

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jury into the error they seem to have committed, the judgment is reversed and the cause remanded, the other judges concurring.

If respondent will remit all of this judgment except $282.18, and interest from February 20, 1874, and pay the costs of this appeal, the judgment will be affirmed.

[Note.—The respondent remitted the sum suggested.]

Louis A. Raum, Respondent, *v.* Gottlieb Eyermann, Appellant.

June 19, 1876.

1. Evidence may be introduced to show that the date of a judgment is erroneously entered on the docket of a justice of the peace.
2. Where an appeal was taken on the day judgment was entered, but by mistake of the justice the judgment was entered as if rendered two days before the appeal, and leave was granted in the Circuit Court to have the certificate of the justice made to conform with the facts, it is error to dismiss the appeal for want of prosecution until the cause has been regularly reached for trial in the order of the docket, and an opportunity given to appellant to show the true date of the judgment.

Appeal from the St. Louis Circuit Court.

Reversed and remanded.

Laughlin, for appellant.

A. J. Quigley and *André & Morris*, for respondent, cited: Wag. Stat. p. 847, sec. 3, p. 850, sec. 21; Hayton *v.* Hope, 3 Mo. 53; Piffen *v.* Millington, 3 Mo. 418; City *v.* Bird, 31 Mo. 88; Fanning *v.* Voelker, 39 Mo. 120.

Bakewell, J., delivered the opinion of the court.

This was an action on a promissory note for $200, instituted in the city of St. Louis, before a justice of the peace. The transcript filed in the Circuit Court shows judgment rendered before the justice, against defendant, on September 10, 1874, and an appeal perfected September 12th. On

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December 9, 1874, plaintiff, by attorney, appeared in the Circuit Court and obtained an affirmance for want of prosecution—no notice of appeal having been given. At the same term defendant moved to set aside the judgment of affirmance, and, in support of his motion, filed an affidavit setting forth that the justice had falsely certified that judgment was rendered on September 10th; that judgment before the justice was in fact rendered on September 12th, the day the appeal was taken, and that no notice of appeal was, therefore, required by law. On January 23, 1875, the Circuit Court sustained this motion, and made an order that defendant "have leave to have the certificate of the judgment of the justice corrected, and made to conform to the facts." No correction was made, and, on February 12th, plaintiff again had said judgment of the justice affirmed in the Circuit Court on motion, without any notice to the appellant, and, on the same ground as before. Defendant then filed a new motion to set aside this affirmance, and filed an affidavit setting out the facts before set forth, and also that, at the time the former order that defendant have leave to have the transcript amended was made, the term of office of Justice Jecko, by whom the judgment had been rendered, had expired, and that neither he, nor his successor, nor any other person, had power to make the correction. This motion to set aside the affirmance was overruled, and, a motion for a new trial having been filed and overruled, the cause is brought here by appeal.

Had the proper application been made in time, and before the expiration of Justice Jecko's term of office, the Circuit Court—being satisfied that the return of the justice was essentially erroneous—could have compelled him by rule, and attachment if necessary, to amend the same. It would have been an exercise of no more than appropriate diligence on the part of appellant to examine the entry before the appeal was perfected, or at least to examine the transcript as soon as filed in the Circuit Court. He did not at any

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time apply for a rule on the justice, and, after the expiration of his term of office, it would, perhaps, have been useless to do so.

But the court having granted leave to have the certificate of the justice amended, we think it was error to affirm the judgment on motion before the cause had been reached for trial in its regular course on the docket. By granting leave the court recognized the probability of material error in the entry of the justice. If, in point of fact, the judgment was entered on the same day that the appeal was perfected, the plaintiff was entitled to no notice of appeal, and defendant was not in default for not having given such notice. The copies of proceedings before justices of the peace, regularly certified, are the proper evidence of what the law requires to be written therein, and the record is, generally speaking, the only proper evidence of the judicial acts of a court. But the transcript of the docket entry of a justice does not import absolute verity, and the testimony of the justice himself might have been taken as to the correctness of the date of the entry of the judgment. If, when the cause was reached for trial in its regular course, the appellant could show by the justice himself, or by testimony otherwise satisfactory, that there was a mistake in the entry of judgment, and that it was in fact rendered on the day of the appeal, then the judgment should not be affirmed for want of notice, and appellant should have been granted an opportunity of making such proof.

We are of opinion that the court erred in dismissing the appeal on motion, without giving to appellant an opportunity of introducing testimony as to the question of the true date of the entry of this judgment, and for this error the judgment of the Circuit Court is reversed and the cause remanded, to be proceeded with in accordance with this opinion. All the judges concur.

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ANDREW CARROLL, Respondent, v. LUCIEN EATON, Appellant.

June 19, 1876.

A special tax-bill issued by the city of St. Louis should show the quantity and character of the work done, the dimensions of the lot charged with it, and the basis on which the tax was assessed upon it. A bill which fails to show the dimensions of the lot charged, and especially its frontage; which is silent respecting the whole value of the work done, and the relation of the frontage of the particular lot to that of all the frontages of the lots chargeable with the whole cost, is not a compliance with the requirements of the charter, and is not evidence for any purpose.

APPEAL from St. Louis Circuit Court.

Reversed.

L. Eaton, appellant, *pro se*, cited: St. Louis v. Clemens, 43 Mo. 395; Ruggles v. Collier, 43 Mo. 353; Sheehan v. Gleason, 46 Mo. 100; Kefferstein v. Knox, 56 Mo. 186; McGrath v. Clemens, 49 Mo. 552; Browne on Stat. Fr., secs. 511, 518.

Krum & Madill, for respondent, cited: Boyce v. Christy, 47 Mo. 70; Wyman v. Cory, 48 Mo. 346.

GANTT, P. J., delivered the opinion of the court.

Carroll sued Eaton to the June term, 1873, of the St. Louis Circuit Court, to recover the amount of two tax-bills, one for $244.62, on account of work done in block 925; the other for $76.46, on account of work done in block 929. In each case the work alleged to have been done was the paving of an alley in the block. It turned out that defendant owned no property in block 925, and the first count of the petition was abandoned. There was judgment on the second count, to reverse which the defendant prosecutes this appeal.

The petition set forth "that the defendant is seized and possessed of the following described real estate," etc., in block 929, and that the city of St. Louis, through its City

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Council, in pursuance of, etc., ordered, by ordinance 6684, the said alley in said block to be graded and paved, and contracted with plaintiff, by contract 1918, for the doing of the work as specified by ordinance 6962, the materials to be used in, and the manner of constructing the work; that plaintiff, under said contract and ordinances, did and completed the grading and paving of said alley in block 929 aforesaid, and after its completion the city engineer computed the cost thereof, and assessed it as a special tax against the adjoining property, the cost of which said work charged to the premises last aforesaid is $76.46; that said officer then made out a certified bill of such assessment against each lot of ground chargeable with the work done in the name of the owner thereof, and, among others, issued and delivered to the plaintiff a certified bill of such assessment against the premises aforesaid, dated July 1, 1871, which bill is herewith filed, etc.; that a lien is given by law against the premises therein described for the payment of this bill, and that the same is unpaid; wherefore he prays judgment. The premises are described in the petition as lying in block 929, and "bounded north by Washington avenue, east by an alley, south by an alley, and west by property of George Partridge."

The answer denied every statement of the second count of the petition except the ownership of the property. At the trial on November 9, 1874, the first count being "withdrawn" (we presume the petition was dismissed as to the first count of the petition), and the cause being submitted to the court, there was a finding and judgment for the plaintiff in the sum of $114.60. At the trial the plaintiff put in evidence the tax-bill, the contract 1918, and the ordinances 6684 and 6962. The defendant objected to the introduction of each document that it was incompetent, irrelevant, immaterial, void, and not proved; and, as to all except the first, that they were not pertinent to the tax-bill or plead-

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ings, and saved exceptions to their admission. The defendant appears to have given no evidence, but asked the court to declare:

1. That the plaintiff could not recover.
2. That ordinance 6684 is void.
3. That, if the work was done under ordinance 6684, read, etc., the plaintiff cannot recover.
4. That the contract read, etc., is void as not being conformed to law and ordinances.

All these the court refused, defendant excepting. The defendant also asked, and the court gave, the following:

1. "That, if defendant had no property in block 929, plaintiff cannot recover on the first count."
2. "That, unless all the work contracted for was completed, plaintiff could not recover."

The plaintiff asked, and the court gave, the following:

1. "If the court finds from the evidence that the special tax-bill No. 3896, for $76.46, read in evidence, is genuine, then said tax-bill, with the city engineer's certificate thereon, is *prima facie* evidence that the work and materials specified in said tax-bills were furnished by the plaintiff, and he is entitled to recover the value thereof stated by the city engineer, in said special tax-bill, with interest on the amount of said bill at the rate of 15 per cent. per annum."

To this defendant excepted, and, after the finding, he moved in arrest of judgment, assigning for cause that the pleadings disclose no cause of action against the defendant, nor the lot of land charged with a lien by the said judgment.

2. "That the pleadings, the record, and the evidence set forth no cause of action."
3. "That the record of pleadings shows nothing which permits a charge on the property described in the second count of the petition."

This being overruled, and also a motion for a new trial, defendant appealed to this court, and he makes the following points:

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1. Ordinance 6684 is void in that it prescribes neither dimensions nor materials, and ordinance 6962 does not prescribe dimensions, but only the paving with limestone on edge; no dimensions of grading, no width or depth of paving, or size of paving stones, are anywhere prescribed in either ordinance; and no others were before the court.

2. Ordinance 6684 is void for uncertainty in the designation of the alleys intended to be paved and graded.

3. The tax-bill fails to designate the alley on which the work was done.

4. The contract was for grading and paving such alleys as the engineer should direct—no such power can be committed to the engineer.

5. The instruction given for the plaintiff was erroneous.

6. The petition does not aver that the defendant's property was adjoining to, or fronted on, the work done, or that the assessment was according to the frontage.

7. That the claim was barred by the lapse of two years after the issue of the bill and before suit.

1. The date of the bill was July 7, 1871, and the defendant appeared to the action on May 10, 1873. This last point seems to be inadvertently made.

2. Though the amount in controversy is small, the principles involved in this suit are interesting and important. The bills issued for special taxes are, by the Charter of St. Louis, declared to be "*prima facie* evidence that the work and material charged in the bill have been furnished, and of the liability of the persons therein named as the owners of the property." We quote from section 11, Article 8, of the Charter of 1867, in force when this work was contracted for. The language of the Charter of 1870 is rather more full, but of the same legal import (sec. 15, Art. 8, p. 481, Session Act): "Such certified bill shall be, in all cases, *prima facie* evidence that the work and materials in such bill have been furnished, of the execution of the work, the rates or prices, amount thereof, and of the liability of the

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person named therein as the owner of the land, charged with such bill, to pay the same." The extreme stringency of these provisions must strike every one, and it may at least be claimed by the person who is charged with the payment of such a bill, and against whom such presumptions are indulged in favor of the allegations of the certified bill, that these last should be at least definite and certain. Recurring to the 11th section of the 8th Article of the Charter of 1867, we find what the certified bill there provided for should show: "Whenever any of the above-mentioned work shall have been fully completed under authority of ordinance, the city engineer, or other officer having charge of the work, shall compute the cost thereof and assess it as a special tax against the adjoining property fronting upon the work done, and each lot of ground shall also be charged, in proportion to the frontage thereof, with the cost of constructing, reconstructing, and repairing the intersections of the next adjoining streets, alleys, or other public highways, in such manner as the said officer shall deem just and equitable."

It could hardly have been intended by the General Assembly, in addition to the enormous powers here conferred upon the city engineer, "or other officer having charge of the work," to exempt him from all accountability and all challenge; to conclude the property owner, and to substitute, without appeal, the will and order of the official for the judgment of one's peers in the determination of a controversy which may involve one's whole estate. To do this would not only be oppressive, but would at least come dangerously near to the limit of legislative power. The truth is, the General Assembly seems to have intended no such thing. The tax-bill is to be prepared in a certain manner, and will be presumed to be correct, leaving to the defendant to show error in its assumptions. But what these assumptions are must appear on the face of the bill, or else no intelligent meaning can be given to the provision

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that the law makes a presumption in their favor. We have seen the statute defining the duties of the engineer or other officer. By it he is required to do certain things: First, he is to compute the whole value of the work done; second, he is to "assess it as a special tax against the adjoining property fronting upon the work done." In what manner is this assessment to be made? According to the value of the property, improvements included? According to the value of the property irrespective of improvements? According to the frontage of each piece of property? The act does not inform us. In respect of "constructing, reconstructing, and repairing the intersections of the next adjoining streets, alleys, or other public highways," the cost is to be laid on each lot "according to the frontage thereof." But, whatever we may conjecture as to the intention of the General Assembly to designate a similar rule of computation in respect of "streets, alleys, or other public highways," we cannot perceive that they have done so, and certainly the property owner has an interest in knowing on what principle the tax-bill is made out. Objections of a fundamental kind may exist to some of the modes of computation suggested as possible. If it be imagined, as is quite consistent with the tax-bill in this case, that the apportionment of the cost of the work—the total of which nowhere appears—to the lot of the defendant, neither the size nor the value of which, improved or unimproved, is shown, was committed to the arbitrary discretion of "the engineer, or other officer," to be made in such manner as such officer "shall deem just and equitable," of course words would be wasted in showing that such a mode could not be upheld for a moment.

Again, the property holder is interested in knowing that the sum he is charged with bears the same relation to the whole value or cost of the work that the frontage or value of his lot bears to the total frontage or total value of all the lots which are to contribute to the general charge. Even if the pretension were made that the particular property owner

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was liable to such share of the whole burden as the engineer, or other officer, should deem just and equitable, it would not be unreasonable that the tax-payer should desire to be furnished with a definite expression of opinion on the part of such officer that the quota charged by him against the tax-payer was in fact deemed by him to be "just and equitable."

We are of opinion that a tax-bill certified under section 11 of Article 8 of the Charter of 1867 that fails to show, at least inferentially, the principle on which the charge made in it is assessed, which shows neither the frontage nor the value of the property assessed, and which fails to show, either in terms or by inference, the amount of work for which the party named in it is charged, is not in compliance with that section, and, therefore, does not become *evidence* under its provisions. In the case at bar some of these essentials, at least, are wanting. There is another defect in this case. It nowhere appears in the pleadings or in the evidence in what direction the alley ran on which the paving was supposed to have been done, nor, indeed, whereabouts within block 929 the alley was. Ordinance 6684 authorized the city engineer "to cause the alleys running east and west, and north and south, through city block 929, from Washington avenue to Locust street, *and from that alley to Beaumont street*, and between Jefferson avenue and Beaumont street, to be graded and paved," and contracted therefor accordingly with plaintiff. We think that this statement stops short of compliance with the requirements of any rule of pleading known to the law. It certainly is not a plain and concise statement of the facts constituting the cause of action. It is very far from being plain, and, taken in connection with the very equivocal tax-bill by which it is supposed to be made good, it furnishes an excellent illustration of the mischief of the neglect of precision.

We do not wish to be understood by what precedes as

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deciding that it is not possible, even at this date, for the engineer, or other officer, to issue a proper tax-bill for the defendant's share of this work. On this point we express no opinion.

With the concurrence of all the judges, the judgment is reversed.

JOHN F. DARBY, Plaintiff in Error, *v.* JOHN KNAPP, Executor of DELPHY CARLIN, deceased, Defendant in Error.

June 19, 1876.

1. In an action by an attorney for services in defending a husband in a divorce and alimony suit, it is error to reject testimony offered by plaintiff to show the property and financial condition of his client. Such rejection is not justified by the fact that there was testimony tending to prove a special contract between the attorney and client.
2. Where an attorney is employed generally to guard his client's interests in a particular matter, and bestows labor in investigations which lead to the conclusion that his client has no real interest in the matter, he is entitled, nevertheless, to compensation for his services.
3. If the plaintiff prove the services on account of which he sues, but introduces no proof of their value, the jury may, from their own knowledge of the business and affairs of society, fix a reasonable value, and find a verdict in his favor accordingly.

ERROR to St. Louis Circuit Court.

Reversed and remanded.

John F. Darby, plaintiff in error, *pro se.*

Cline, Jamison & Day, for defendant in error.

LEWIS, J., delivered the opinion of the court.

Plaintiff presented for allowance, in the Probate Court, his account against the estate of defendant's testator for professional services as attorney at law, and for moneys paid on the testator's account during his life-time. The Probate Court refused an allowance, whereupon the plaintiff appealed to the Circuit Court, where the cause was tried before a jury. Verdict and judgment were rendered in favor of the defendant.

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The charges in the account amounted to $1,550 for professional services, and $1,727 for moneys paid—making in all $3,277. The credits, all being cash payments, amounted to $2,427, leaving a balance claimed of $850. The three following items, among those of services rendered, constitute chiefly the basis of the present controversy:

"To drawing bill for divorce against Mary Carlin, and prosecuting said suit to final judgment, and obtaining decree of divorce, throughout, etc., $500.

"Drawing copy of bill of Mary Carlin against you and sending to you, and drawing your answer to the same, and defending said suit successfully for D. Carlin, and, as his counsel, having the bill dismissed, $500.

"Services rendered you in the case of Mad. Huth in defending the suit, and assistance in the same, and in the Supreme Court against her claim for dower to land in Carondelet, $250."

It appears from the testimony that the divorce suits were closely contested, and that the services rendered in them by the plaintiff were highly valued by the testator, to whom the terms of the decree, with reference to alimony, were more favorable than he had anticipated. In the course of the trial the plaintiff offered to prove the value of Mr. Carlin's estate at the time of the divorce proceedings. Upon defendant's objection this testimony was excluded, and the plaintiff excepted.

This ruling was erroneous. In every divorce suit where alimony is decreed, the value of the husband's estate becomes an essential element in estimating the amount to be decreed, against him. The ratio which the one shall bear to the other is usually a matter of controversy engaging the most earnest efforts of opposing counsel. The best service to be rendered by the attorney for the husband consists in getting the alimony fixed at the lowest possible ratio to the amount of his client's whole estate. There is no settled rule of proportion. Much will depend upon the

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social standing of the parties, their habits of life respectively, the productiveness of the husband's capital, and even on the respective derelictions of the parties from marital duty. These, and other elements, invite much skillful handling on either side of the contest. If the husband be worth $100,000, and the alimony be $2,000 per annum, it cannot be denied that such a decree is more favorable to him than the same would be against a man worth only $5,000. Thus the pecuniary condition of the husband furnishes a starting point for estimating the skill of his attorney, and the value of the latter's services in procuring a minimum decree. It may be true, as defendant's counsel suggests, that here "the value of the attorney's services is controlled by the wealth of his client;" but this is because of the peculiar nature of the service. In ordinary suits the amount of the recovery bears no necessary relation to the means of either party, but in divorce and alimony proceedings there is always such a relation—the one inevitably tending to control the other. If, then, the jury in the present case were to estimate the value of the plaintiff's services, he had a right to show them, if he could, that the wealth of his client was such as to have evoked a larger assessment of alimony but for the skillful advocacy that prevented. This subject was fairly elucidated at the trial by the testimony of an eminent attorney, since deceased. He said: "The charges for professional services in obtaining a divorce, wherein the questions of support and alimony would come in, were governed in a measure by the value of the estate and financial condition of the husband. * * * In all suits for divorce, alimony, and maintenance, the pecuniary condition of the husband formed a very essential basis for the consideration of the court, and professional services in such litigation were to be measured and charged for somewhat as to the value and extent of the estate, and the talent and ability of the counsel to protect it from being wrongfully assessed."

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But it is insisted for defendant that the plaintiff could not have been injured by the exclusion of this testimony, since it was shown that the divorce services were rendered under a special contract. The evidence of a special contract was, at best, inferential, and anything but conclusive. The jury might well have found, from all that was before them, either that there was, or was not, a specific understanding of what the plaintiff was to receive. Under such circumstances it is erroneous to deprive the jury of any legitimate guide to a correct conclusion upon the one or the other alternative. It would be easy to show, by a computation if necessary, that a sufficiency of the other debit items in plaintiff's account were proved by direct testimony to make his right of recovery, in any sum at all, depend upon the estimated value of his services in the divorce cases, so that the verdict for defendant could well have resulted from a low estimate attached by the jury to those services. Such a result is attainable even after limiting the plaintiff's compensation in Mrs. Carlin's suit to $200, the amount which, as some of the testimony tended to show, was all that he had formerly demanded.

The court, at the instance of defendant, gave an instruction, as follows:

"The jury are instructed that there is no evidence in the case showing the value of any services rendered by the plaintiff in the case of *Huth* v. *Carondelet Dock Company*, and you must so find."

This was erroneous, as being calculated to mislead the jury into a belief that they could not lawfully allow the plaintiff any sum for the services mentioned. The testimony tended to show that the plaintiff was employed by the testator to guard his interests, as they might be affected by the suit of Mad. Huth for dower in lands which the testator had conveyed; that the plaintiff bestowed labor in investigating the matter accordingly, and in frequently advising with the counsel already employed in the suit.

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The testator's interests may really have been in no jeopardy. But if, nevertheless, the plaintiff was employed by the testator only to ascertain that fact, he was entitled to some compensation for the service rendered in so doing. In order to do this it was not necessary for the plaintiff to prove, by specific or direct testimony, the value of such service. In *Craig* v. *Durrett*, 1 J. J. Marsh. 365, and in *Baum* v. *Winston*, 3 Metc. (Ky.) 127, affirming the former, it was held that, in an action to recover the value of work and labor, the jury have a right, in the absence of all proof of the value of such labor, and from their own knowledge of the ordinary transactions and business of society, to find a verdict for the price of the work done, and for which the action was brought. In *Mattocks* v. *Lyman*, 16 Vt. 113, it was decided that, "if the plaintiff show to the jury that he has performed services for defendant, but his testimony leave uncertain the amount which he is entitled to recover therefor, this will not preclude his right of recovery, but the jury may allow him such sum as they deem the services reasonably worth."

Judge GANTT not sitting, and Judge BAKEWELL concurring, the judgment is reversed and the cause remanded.

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SAMUEL S. BRAINARD *et al.*, Appellants, *v.* JAMES A. REAVIS *et al.*, Respondents.

June 19, 1876.

One who takes negotiable paper before maturity, as security for an antecedent debt, holds it subject to the equities between the original parties.

APPEAL from St. Louis Circuit Court.

Reversed, and final judgment rendered.

H. D. Wood, for appellants, cited: Dewitt *v.* Perkins, 22 Wis. 475; Hunt *v.* Sandford, 6 Yerg. 387; Brown *v.* Tabor,

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5 Wend. 566; Anderson *v.* Nichols, 28 N. Y. 600; Hamilton *v.* Marks, 52 Mo. 78; Gill *v.* Cubit, 3 B. & C. 466; Story on Bills, sec. 194; Whitbred *v.* Jourdan, 1 You. & Coll. 303–328; Goodman *v.* Simond, 19 Mo. 106.

T. G. C. Davis, for respondents.

BAKEWELL, J., delivered the opinion of the court.

This is a proceeding in equity to obtain the cancellation of certain promissory notes. The allegation is that these notes were fraudulently obtained from plaintiffs by defendant Reavis, and transferred to defendant Davis with notice of the fraud.

The answer of Davis denies the material allegations of the petition.

Reavis was not served, and the proceeding was dismissed as to him.

The cause was tried before the court, and a decree rendered in favor of defendant. A motion for a new trial having been overruled, the cause is brought here by appeal.

It appears from the evidence that, on February 28, 1873, Reavis sold to plaintiff Brainard, as trustee for plaintiff's wife, 100 feet on Washington avenue, St. Louis.

To secure the deferred payments, Reavis took four deeds of trust, each upon twenty-five feet of the trust sold; each deed securing one principal note for $500, at thirty months, and five interest notes of $25 each.

The sale was concluded at Brainard's house, at night, and Reavis assured Brainard that the property was unincumbered.

At the time of making this assurance Reavis knew it to be false, as the property was then incumbered by two deeds of trust made by Reavis, one upon each half of the hundred feet sold, securing notes for $3,000, and interest under these deeds of trust. The property was sold on July 7, 1873, and purchased by Brainard.

On June 13, 1873, Brainard first heard of the existence

of these prior incumbrances, and called upon Reavis for an explanation.

Reavis promised to return the notes, and, on July 12th, gave Brainard a written statement that he had not negotiated these notes or placed them beyond his control; that they were void for failure of consideration, and that he would return them to Brainard, canceled, in ten days from date. They were never returned to plaintiff, but were, at the date of the judgment in this case, held by defendant Davis.

Defendant Davis swears that, on June 13, 1873, Reavis owed him $500, being proceeds of a note belonging to Davis which Reavis had collected and converted to his own use, and that Reavis also owed him $250 for services, and that the notes of Brainard were at that date in the possession of parties to whom Reavis had pledged them as security for $30; that Davis advanced to Reavis $30 to redeem these notes, which were then delivered to him by Reavis to indemnify Davis for the amount thus due by Reavis to him. Plaintiff swears that he had a conversation with Reavis about July 10, 1873, in the presence of Davis, in which Reavis said that he had been holding the Brainard notes to get them all together; that they were in Davis' keeping at the time. Reavis referred to Davis to confirm this statement, which Davis did by an inclination of the head.

At this interview, in the presence of Davis, Reavis' father said that Davis was merely holding on to these notes for safe-keeping. Hale, the holder of the prior incumbrance, under which the property was sold, testifies that he had conversations with Reavis about this incumbrance, in the presence of Davis, during April and May, 1873; that he told Davis about the middle of June that he was going to foreclose, and Davis asked him to wait. One Lett swears that, in December, 1873, he asked Davis if he knew any-

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thing of the transaction between Reavis and Brainard, and Davis replied that he knew too much about it.

Davis was a clerk in Reavis' office, drew the deed and deeds of trust between Reavis and Brainard, and took the acknowledgments as notary.

He swears he had no notice of the fraud, and took the Brainard notes in good faith. He says nothing in his testimony as to the conversations between Reavis and Brainard in his presence.

The evidence in this case tends very strongly to show that Davis had notice, when he took these notes, that they had been obtained by Reavis in bad faith. It seems impossible, at any rate, to escape the conclusion that he knew enough about the matter to put him on his guard. Except that he seems to have advanced $30 to obtain possession of these notes from the party to whom they were pledged for that amount, they were transferred to Davis merely as collateral security for an antecedent debt.

But one who takes negotiable paper before maturity, as security for an antecedent debt, is considered, in Missouri, to hold it subject to all equities existing between the original parties. *Goodman* v. *Simonds*, 19 Mo. 106; *Grant* v. *Kidwell*, 30 Mo. 455. The rule has been laid down differently in some other States, and in the Supreme Court of the United States, 20 How. 343; but, under the law applicable to the matter in Missouri, the defendant must be required to deliver up these notes on being reimbursed the amount he actually paid upon them.

The judgment in this cause is, therefore, set aside, and judgment here will be entered, in favor of plaintiff against defendant, that he deliver up to plaintiff to be canceled the notes described in the petition, on being repaid $30 advanced by him on the notes, with interest from June 13, 1873. All the judges concur.

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A. M. WATERMAN *et al.*, Respondents, *v.* JAMES HARKNESS, Appellant.

June 19, 1876.

An agreement in a lease dated March 25, 1852, to pay all taxes "that may be assessed, levied upon, or charged against" the leased property for twenty years, binds the lessee to pay the taxes for 1872, which were assessed prior to the expiration of the lease, though not levied until afterwards.

APPEAL from St. Louis Circuit Court.

Affirmed.

Irwin Z. Smith, for appellant.

John N. Straat, for respondents, cited: Blossom *v.* Van Court, 34 Mo. 390; McClaren *v.* Sheble, 45 Mo. 130.

STEWART, Special J., delivered the opinion of the court.

This action was brought on a lease dated March 25, 1852, executed by the ancestors of plaintiff to defendant and another. The term commenced March 25, 1852, and ended March 24, 1872. The covenant in the lease, which plaintiffs allege in their petition was broken by the failure of defendant to pay the taxes assessed upon the property for the year 1872, is as follows:

"And also the payment by said lessees of all State, city, and county taxes or charges that may be assessed, levied upon, or charged against said lot and improvements thereon, for any purpose whatever, during the continuance of this lease, including all taxes and charges for the present year, 1852."

The petition alleges that defendant refused to pay the taxes for the city, State, and county assessed on the demised premises for the year 1872; that the plaintiff paid the same, and asks judgment for the amount, with interest.

The defendant demurred to the petition on the ground that it does not appear from the covenant contained in the lease, as stated in the petition, that defendant was liable to

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pay the taxes assessed in August, 1871, and payable in the year 1872; and, further, that it does not appear by the covenant in the lease, as recited in the petition, that defendant has not paid all the taxes that he was compelled to pay, or liable for, under the terms of the lease. This demurrer was sustained by the special term, and judgment given for defendant. Plaintiffs appealed to the general term, where the judgment of the special term was reversed, and from this judgment of reversal defendant appealed.

Under the law in force when this lease was made the taxes for the year 1852 were assessed in February of that year, but were not leviable until after March 25, 1852, the date of the lease. Hence, under the doctrine of the case of *Fargo* v. *Vallé*, lately decided by this court, the lessees were liable to pay the taxes assessed for the year 1852, irrespective of the clause of the covenant "including all taxes and charges for the present year, 1852." In the case cited the lessee covenanted to pay all taxes whatever to be levied during the term of this lease, "including the taxes for the year 1849." In that case the lease was executed June 7, 1849, and the term ended June 6, 1869. The taxes for the year 1849 were assessed prior to the date of the lease, but were not leviable until after that date. This court held that the lessee, under the general covenant to pay all taxes to be levied, etc., was liable to pay the taxes for the year 1849, irrespective of the additional words "including the taxes for the year 1849;" and that, by the employment of the words, the parties were only saying that the lessee should, by all means and without doubt, pay the taxes for 1849, as part of those for which he stipulated.

The action in that case was to recover the taxes assessed for the year 1869. The taxes assessed for that year were not leviable until after June 6th—the expiration of the lease, and this court held that the lessee was not bound to pay the taxes of that year, inasmuch as this covenant required him to pay the taxes to be levied upon the prem-

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ises during the term, and that the taxes for the year 1869 were not leviable during the term. In this case the court very clearly distinguished between the terms "levy" and "assess," as applied to taxation, and held that the levying a tax is the collection of it. Applying the doctrine of that case to the one at bar, it follows that the lessees were liable to pay the taxes for the year 1852 under their general covenant, inasmuch as they were to be levied after the commencement of the term; and that the words "including all taxes and charges for the present year, 1852," did not create that liability, but only more specifically expressed the intention of the parties as to the payment of the taxes of that year.

It was agreed by counsel for appellant that the lessee was not liable for the taxes sued for in the case at bar, because he had made himself liable to pay the taxes for 1852; and, if he be compelled to pay the taxes for the year 1872, he then has to pay the taxes for twenty-one years on a lease for twenty years, and this could not have been intended; and that the words "including all taxes and charges for the present year, 1852," should be construed as a limitation upon the general covenant, and as specifying with particularity when the payment of the taxes to be assessed, levied upon, or charged against said property, during the continuance of this lease, should commence; and that, taken together, this covenant shows that it was intended the lessees were to pay taxes for twenty years, and no more. We do not think this covenant, as set out in the petition, susceptible of such a construction, but that the parties intended precisely what they said—that the lessee should pay the taxes for the year 1852, and all other taxes assessed, levied upon, or charged against the demised premises during the continuance of the lease. The lease expired March 24, 1872. The taxes for the year 1872 were assessed upon the lot in August, 1871, and hence defendant was liable to pay them.

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It follows, therefore, that the judgment of the general term must be affirmed.

In this opinion Judges LEWIS and BAKEWELL concur, Judge GANTT not sitting.

STATE OF MISSOURI, *ex rel.* AUGUST REBENACK, Respondent, *v.* MICHAEL FOERSTEL *et al.*, Appellants.

June 19, 1876.

Plaintiff obtained judgment against township board of education, as trustee to use of sub-district No. 3, on suit commenced under school law of 1870. Before judgment the school law of 1874 was enacted, vesting the title to the school property, formerly held by the township board as trustee of sub-district No. 3, in district No. 6, which was incorporated for that purpose, and succeeded to all the rights and property of sub-district No. 3. *Held,* that *mandamus* would lie to compel the board of directors of district No. 8 to direct their clerk to draw his warrant on the county treasurer, in favor of plaintiff, for the amount of said judgment and costs.

APPEAL from St. Louis Circuit Court.

Affirmed.

Lighthizer, for appellants, cited: Wag. Stat. 123, secs. 7, 8, 19, 24, 27; Lewis *v.* Barclay, 35 Cal. 213; *Ex parte* Ostrander, 1 Denio, 682; *Ex parte* Newman, 14 Wall. 165; Perry on Trusts, secs. 873, 874; People *v.* Dubois, 33 Ill. 140; People *v.* Breman, 39 Barb. 651; People *v.* Thompson, 25 Barb. 73.

Aug. Rebenack, for respondent, cited: Puterbaugh *v.* Township Board, 53 Mo. 472; Wag. Stat. 295, secs. 36, 31.

BAKEWELL, J., delivered the opinion of the court.

This was an application for a *mandamus* to compel defendants, as board of directors of school district No. 3, township 45, St. Louis county, to direct the clerk of said board to draw his warrant upon the treasurer of St. Louis county, in favor of petitioner, for the sum of $412.60, interest and costs, being the amount of a judgment

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recovered by plaintiff, on March 30, 1874, against the township board of education, as trustee to the use of sub-district No. 3, for damages arising from relator's unlawful discharge as teacher of said sub-district No. 3 of said township.

The contract of relator with the board of directors was made, his cause of action accrued, and suit was commenced by him under the revision of the school law of this State in force in 1870. Judgment was obtained a few days after the enactment of the school law of 1874.

Appellants, in their return, admit that judgment was obtained as alleged by the relator, but deny that he had a sufficient cause of action; say that the sub-district No. 3 had a valid defense to his claim; and say that it is not a party to the judgment against the township board of education.

The Circuit Court, on hearing, found all issues in favor of relator, and granted a peremptory writ. A motion for rehearing having been overruled, the cause is brought here by appeal.

The contract with relator was made with the local directors of the sub-district, under the law of 1870. They were, under the law, the persons authorized to contract with teachers, and having the care and keeping of the property of the sub-district. But the title to all the school property was then, by law, vested in the township board of education, which was, by the law, created a body corporate. All contracts made with teachers are to be filed with the township clerk, and the township board of education itself is composed of the clerks of the sub-districts within the township limits, and all expenses incurred by the local directors for the sub-district are to be paid by the township clerk, on the order of the clerk of the sub-district, out of any funds for that purpose belonging to the sub-district. We think that under this law the township board of education, and not the local directors, were the proper parties defendant

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to a suit by a teacher, under a contract such as the one before us. *Puterbaugh* v. *Township Board*, 53 Mo. 472.

After the commencement of suit, however, and on March 26, 1874, four days before judgment was rendered for plaintiff's relator against the township board of education, a new school law was passed incorporating all sub-districts, and giving them the legal title to all property theretofore held in trust for them by the township boards. District No. 3, under the new and existing law, succeeds to the liabilities, as well as the rights, of sub-district No. 3, and we see nothing in this change in the law which need, in any way, affect the remedy of plaintiff's relator.

By law, no execution could issue against any property of the township board of education, and it is made the duty of the district clerk to draw his warrant on the county treasurer in favor of any party to whom the district has become liable as a teacher, said warrant to be paid out of any moneys, in the appropriate funds, in the hands of said treasurer and belonging to the district.

We think the relator was clearly entitled to his remedy by *mandamus*, and that the Circuit Court committed no error in granting the peremptory writ. The judgment of the Circuit Court is, therefore, affirmed. All the judges concur.

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JOHN A. SMITHERS, Respondent, *v.* RUDOLPH BIRCHER, Appellant.

June 19, 1876.

1. **Where a representation is made of a material fact, which was understood at the time and accepted as a warranty, this is sufficient to hold the vendor, though in good faith and innocently mistaken.**
2. **Where a petition sets out a representation and affirmation of certain facts, on the faith of which plaintiff received certain notes, this is sufficient to hold defendant as warrantor. No particular phraseology need be set out**

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or proved; nor need the pleader charge in terms that defendant warranted the truth of his statements.

3. Where defendant sold certain real estate notes, indorsing them without recourse, and saying they were well secured and first liens on real estate, and the notes were accepted by plaintiff on the faith of these representations, *held*, that defendant was liable as warrantor.

Appeal from St. Louis Circuit Court.

Affirmed.

Krum & Madill, for appellant, cited: David *v.* Park, 103 Mass. 501; Baumeister *v.* Alderman, 111 Mass. 261; Fisher *v.* Mullen, 103 Mass.; Bennett *v.* Judson, 21 N. Y. 238; Wakeman *v.* Dalley, 51 N. Y. 27; Langdon *v.* Green, 49 Mo. 363; Wannell *v.* Kim, 57 Mo. 478; Lindsay *v.* Davis, 30 Mo. 406; Collyer on Suretyship, 1, 2; Hammond *v.* Espy, 1 Wilson (Ind.), 536; Joliffe *v.* Collins, 21 Mo. 338; Peers *v.* Davis, 29 Mo. 184; McFarland *v.* Carver, 34 Mo. 195; Owens *v.* Rector, 44 Mo. 389; Langdon *v.* Green, 49 Mo. 363; Hazard *v.* Irwin, 18 Pick. 95; Wakeley *v.* Dalley, 51 N. Y. 27.

Glover & Shepley, for respondent, cited: Wannell *v.* Kim, 57 Mo. 478; Rawlins *v.* Wickham, L. J. 28; N. Y. Eq. 188; N. B. & Canal Co. *v.* Maggendie, 1 Drew. & Sm. 363; Carter *et al.* *v.* Black, 46 Mo. 384; Baker *v.* Scudder, 56 Mo. 272; Edwards *v.* Marcy, 2 Allen, 490; Cabot *v.* Christie, 42 Vt. 121; Frenzel *v.* Miller, 37 Ind. 9; Warner *v.* Daniels, 1 Woodb. & M. 90; McFarran *v.* Taylor, 3 Cranch, 281; Hamman *v.* Espy *et al.*, 1 Wilson, 536; Bennett *v.* Judson, 21 N. Y. 238; Edw. on Bail. 201, 225, 251; Story on Bail., sec. 287.

Bakewell, J., delivered the opinion of the court.

The plaintiff claims in his petition that, on February 20, 1871, he owned a lot of ground in St. Louis, which defendant then proposed to buy for $90,000. The payment was to be made by assuming an indebtedness of $35,000 to become due, and then a lien upon the property sold; the remaining purchase money was to be paid partly in cash,

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and partly in good real estate notes held by appellant, which notes were to be equivalent to cash, and secured by deeds of trust, constituting the first liens on the real estate securing these notes. A portion of the debt due on the premises sold, and assumed by the purchaser, was payable, as to principal and interest, in gold. Upon the payment of the consideration in this manner, plaintiff was to execute a deed and pay appellant the difference between gold and currency, as each payment of the interest and principal of the debt payable in gold was made by appellant.

That plaintiff accepted defendant's proposition, and, before any conveyance was made to defendant by plaintiff, said defendant exhibited to plaintiff—as a part of said consideration, which he was to pay either in cash or notes of other parties so held by him, and the payment of which was to be secured by deeds of trust upon real estate, which deeds of trust were to be first liens or incumbrances upon the real estate securing the same—a note for $12,000, dated May 20, 1870, payable to the order of defendant five years after date, made by Stanford Graves, together with ten interest notes for $600 each, at intervals of six months from that date, and represented to plaintiff that all of said Graves' notes were secured by a first deed of trust, dated May 20, 1870, executed by said Graves upon a valuable tract of land in Jefferson county, Missouri, of greater value than the notes, which tracts of land are described as follows: (describing them) together with a steam-mill, barn, and dwelling, and other houses erected thereon, and exhibited a policy of insurance thereon, from loss or damage by fire, and, at the same time, represented that said notes so signed and secured by said deed of trust were as good as, and equivalent to, cash; that, relying upon the representations and statements of defendant, before mentioned—as to the character of the notes, and as to the notes being the first deed of trust and incumbrance on the real estate securing them, and that the real estate was of greater value than the

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notes, and that the insurance was an insurance upon the buildings upon the land mentioned in the deed of trust—plaintiff made no examination of the premises or of the title, but accepted the notes upon the faith of these statements and representations, and, in consideration of the transfer to him by defendant of said notes and policy of insurance as represented, accepted said notes of $12,000 as so much cash, and, in further consideration of the payment by defendant of $35,000.89 in cash, and the delivery by said defendant to plaintiff of notes of other parties, similarly secured, for the balance, said plaintiff made to defendant a deed of the Smithers' building and lot, and put him in possession, and entered into an agreement to pay the difference on the gold loan between gold and currency; that all the representations made by defendant were false; that said notes were not equal and equivalent to cash, nor was said deed of trust the first lien and incumbrance upon said real estate described therein, nor were the buildings purporting to be insured by said policy on the real estate in said deed described—but the notes at the time were worthless, and part of the interest notes have become due and remain wholly unpaid; that Graves had, prior to May 20, 1870, conveyed the real estate described in the afore-mentioned deed to Henry Dausman, trustee of John E. Ligget, to secure the payment of three principal notes—one for $1,380, at one year, one of $2,400, at two years, and one for $8,220, at three years after date—all of which remain wholly unpaid; that the real estate described in said deed of Graves to Dausman, as trustee, is worth no more than the amount of the notes secured thereby; that said notes of said Graves, payable to, and delivered by, defendant to plaintiff, are wholly unpaid; that, in August, 1872, Graves applied, in the United States District Court, at St. Louis, to be declared a bankrupt; that Graves is wholly insolvent; that said plaintiff would not have executed to defendant the deed had he known that said notes of Graves, so proposed

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to be given to him as part of said purchase price, were not secured by a first deed of trust upon the property in said deed described; that, before suit, he offered and tendered to defendant the note of said Graves, and deeds of trust so received from defendant, and demanded from him the amount of the consideration money for said purchase still remaining unpaid, being the sum of $12,000, and interest upon the same, at the rate of 10 per cent. per annum, from the date of said sale, which he refused, and plaintiff brings the said notes and deed of trust into court, ready to be delivered to said defendant, and asks judgment for the sum of $12,000, with interest at 10 per cent. from the day of the sale.

The answer of defendant denies every material allegation in the petition involving any statement, or agreement, or representation upon which an action by respondent could be based by reason of said Graves' deed of trust not being a first lien, or the notes secured by it not being as good as, or equivalent to, cash, or on account of the value of the premises, or any question of insurance. The answer also contains affirmative averments, by way of further defense, of which the following are the substance: That, at the time appellant agreed to purchase the respondent's premises, it was understood and agreed between them that the notes delivered respondent, in part payment of the purchase money, were to be, and in fact were, accepted by respondent, with appellant's indorsement, "without recourse," to him thereon; and that said notes, including Graves' notes, were, in pursuance of said agreement, so indorsed by appellant; that it was also understood and agreed that, in no event, should appellant be liable on, or on account of, any of said notes, either to respondent or to any other person. The answer also further averred that the principal note and seven interest notes were not due when the suit began.

No reply was filed to this answer.

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It appeared from the evidence in this case that E. G. Obear, a real estate agent, had for sale for the owner, Smithers, a lot in St. Louis, on which was erected "the Smithers' building." About February 20, 1871, Obear effected a sale of this property to Bircher. The price demanded was $100,000; but it was, after one or two interviews between Obear and Bircher, sold for $90,000 cash. Bircher says that, at the time the terms were agreed upon, he told Obear that he should pay part in cash and part in real estate notes equivalent to cash; but Obear's recollection is that the proposition to take real estate notes was not made till after the terms had been agreed to. On March 1st the sale was consummated. Smithers says that he then first heard of the proposition to take real estate notes in part payment; but the proposition had been accepted by Obear about a week before that date. It was agreed between Obear and Bircher that the real estate notes to be taken were to be equivalent to cash. Amongst these notes was one of Stanford Graves for $12,000, with semi-annual interest notes at 10 per cent. Bircher stated to Obear that this note was a first lien on property in Jefferson county, for sufficient value to fully secure the loan, that he had seen the property, that there was a good house on it, and that the title was perfect. Several days before the consummation of the sale, Bircher left with Obear, for his inspection, the deeds of trust securing the real estate notes which were to be taken instead of cash, a policy of insurance on the house in Jefferson county, and abstracts of title to each piece of property. Obear says that he reported the proposition, to give real estate notes, to Smithers as soon as it was made. The recollection of Smithers is that he first heard of this proposition on March 1st, when the parties met at Obear's office to consummate the sale. His testimony is that, when he went to Obear's office on March 1st, Bircher produced some notes and said: "If you don't need all the money, you will save me the

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trouble of raising it by accepting these notes; they are all first liens on the property, secured by deed of trust. They are better than cash." Graves' note was amongst the lot, and Smithers spoke of it as being secured by country property; whereupon Bircher said the property was worth $30,000. Bircher then said he could indorse all the notes "without recourse." Smithers replied that he did not care how he indorsed them, if they were as represented. Bircher said there was a fine brick house on the property, and that there would be no trouble about the notes. There was no conversation between Smithers and Bircher about the sale before the day on which it was consummated. Bircher says that, when he took the examinations to Obear, he said: "You can look at them and see; these are the examinations of title; there is the deed of trust." And Obear replied: "I know they are all good, if you took them." Judge Krum, the attorney of Bircher, testified that he saw the certificate of examination of title of the Graves' property soon after it was made; that, soon after the sale of the Smithers' building had been agreed on, Obear asked him what he knew about the Jefferson county land, to which Judge Krum replied that he knew nothing about it except that he had passed upon an abstract of title submitted to him.

Sometime after these transactions Obear, acting for Smithers, sold this Graves note to Charles Jones, who gave him his check in the afternoon, and took away the note. The next morning Jones got back his check, returned the note, and stated that he had heard that there was a prior deed of trust on the property. This turned out to be true. Not only was there a prior deed of trust for $12,000 on the property, but the portion of the farm containing the dwelling-house was not included in the description in the Bircher deed of trust. The premises turned out to be security for no more than the first incumbrance, and Graves was insolvent.

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There is no question made as to the good faith of Bircher in the transaction; and that he fully believed the statements he made in regard to the matter to be true is not disputed. He was at once notified of the worthlessness of the note, and asked to make it good. This he positively refused to do, stating that the notes were good when he gave them; that he got the building dear enough, and that he had nothing to do with the papers.

Obear and Smithers both swear that they took the notes relying wholly on Bircher's statements in regard to the matter. Obear says that he looked over the abstract of title furnished by Bircher, and understood it, but that he made no examination himself, and caused none to be made, as to the value or title of the property. He had known Bircher for many years, had done business for him, and had implicit confidence in his carefulness, business sagacity, and truth.

As one of the liens upon the property sold, assumed by appellant, was payable in gold, it could not be foreseen precisely how much would have to be paid in currency to discharge the interest as it matured and the principal, and respondent agreed to return to appellant the premium which he might have to pay for gold in discharging this lien. The Graves note, for $12,000, was deposited with Obear as a collateral to secure the performance of this agreement. Appellant, under the agreement, paid $3,218.75 for premiums on gold. It does not appear that any part of this has been repaid by plaintiff to defendant.

Both the parties and Obear resided in St. Louis. This suit was commenced July 8, 1872, the day on which appellant refused to pay the Graves notes—nearly three years before the principal note of Graves became due. On August 22, 1872, the petition in bankruptcy was filed against Graves, and he was adjudicated a bankrupt on November 12, 1873. It does not appear what dividend was paid out of the estate in bankruptcy.

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On April 23, 1875, a month before the principal note of Graves matured, the jury in this case returned a verdict for plaintiff for $16,100. Judgment was entered for this amount, and, a motion for a new trial having been overruled, the cause is brought here by appeal.

At the instance of plaintiff the court gave the following instructions:

1. "The jury are instructed that any representations, in relation to said note of $12,000, made by defendant to any agent of plaintiff, prior to the time the same was indorsed and delivered by defendant to plaintiff, if the same were communicated by such agent to plaintiff before said indorsement to said plaintiff, are representations made by defendant to plaintiff."

2. "If the jury believe from the evidence that, about February 20, 1871, the said defendant proposed to purchase from plaintiff the Smithers building, and lot on which same was situated, at the sum of $90,000, by assuming certain incumbrances thereon, and paying the remainder, amounting to $55,000, partly in cash and partly in notes, which were secured by deeds of trust upon property, and which deeds of trust were the first incumbrances upon the property described in the respective deeds; that among the said notes so secured by deeds of trust was a note executed by Stanford Graves, dated May 20, 1870, for $12,000, payable to the order of defendant, five years after date, together with interest notes for the maturing semi-annual interest that would become due thereon, at 10 per cent. per annum, which was secured by a deed of trust, made by Stanford Graves, upon a tract of land in Jefferson county; that, in order to induce the said plaintiff to accept and take such note of $12,000 as so much cash, in part payment of said lot, said defendant represented to said plaintiff, positively as a fact, that the said deed of trust securing the same was a first lien upon said tract of land in said Jefferson county, and said note was as good as, and equivalent to, cash; that

said plaintiff, relying upon said representations of said defendant being true, took and received the said principal note of $12,000, so made by said Graves (together with the interest notes for the unpaid interest), indorsed without recourse by defendant, for the amount of said principal, as so much cash, in part payment for said building, and without such representations by defendant, said plaintiff would not have taken said notes, and conveyed said lot and building to defendant; that, at the time of said representations, and of said conveyance, the said tract of land described in the deed of trust securing the said note of $12,000, was then, has continued to be, and is now, incumbered by a prior deed of trust, for an amount not greatly larger than its value; that the said Stanford Graves, prior to and at the commencement of this suit, was insolvent; that said note remains wholly unpaid; that said plaintiff, as soon as he discovered that there were prior incumbrances upon said land, and prior to the commencement of suit, tendered to said defendant the said notes, principal, and interest, and demanded the said sum of $12,000—then the plaintiff is entitled to recover from said defendant a sum equal to the said sum of $12,000, with interest thereon from the said November 20, 1871, at the rate of 10 per cent.; and it makes no difference whether the jury believe that, at the time of making the said representation to plaintiff, the said defendant believed them to be true or not, if they were false in fact, nor that said defendant, when he delivered the said notes to plaintiff, indorsed the same without recourse."

The following instruction was given at the instance of defendant:

"If the jury believe from the evidence that, before the deed of trust made by Graves was transferred to the plaintiff, the defendant delivered it to the plaintiff, or his agent, Obear, with the abstract of title and the certificate of examination, read in evidence, as to incumbrances upon the premises described in said deed of trust, and only

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declared it as his opinion or belief, based upon such abstract and certificate, that said deed of trust was a first lien upon said premises, and did or said nothing intentionally to mislead or prevent said plaintiff, or his agent, from examination as to incumbrances upon said land to be made, then the court instructs the jury that the fact that said deed of trust was not a first lien or incumbrance upon the premises described in it does not of itself give the plaintiff a right to recover in this action."

Declarations of law, substantially as follows, were asked by defendant, and refused:

1. "That fraud cannot be presumed in this case; it must be proved.

2. "To recover, plaintiff must show misrepresentation by defendant of a material fact; that defendant knew the falsity of his statement; that plaintiff relied upon this representation, and could not, by the exercise of ordinary care, have ascertained its falsehood.

3. "That, if plaintiff did not use ordinary diligence to ascertain the facts about the Graves title, and was not prevented from exercising such diligence and caution by any artifice of defendant, he cannot recover.

4. "That, if both parties were in an equally good position to ascertain the facts, and defendant was guilty of no intentional misrepresentation, plaintiff cannot recover.

5. "That plaintiff is not entitled to recover on the evidence."

This is not an action for damages arising from any misconduct of the defendant. It is not pretended that he fraudulently stated what he knew to be false, or what he did not have good reason to believe to be true. It is conceded, and is quite clear from the evidence, that he was convinced of the truth of his statement at the time it was made, and had taken pains to ascertain the fact. Before he made the loan to Graves, he took the ordinary precautions. He visited the property, caused an abstract of the title to be

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furnished to his lawyer by the recorder of deeds of the county where the land lay, and was advised that the title was perfect. The mistake was in the abstract furnished by the recorder, and shows either that the index was imperfect, or that it was carelessly examined. No caution on the part of the purchaser of real estate can furnish an absolute protection against the consequence of errors in the recorder's office, or oversight on the part of the man who examines the index. Bircher said the note was well secured. He believed it; and it is in evidence that, but for the existence of the prior deed of trust, the notes of Graves were sufficiently secured after making allowance for the misdescription of property in the deed.

Neither is this a proceeding in equity to rescind a contract on the ground of innocent mistake.

This action proceeds upon the theory that, if a misstatement be made by one party to a bargain, of any material matter, which statement induces loss to the other party, all actual damage caused by such misstatement must be made good.

The tendency of all modern cases is to enlarge the responsibility of the seller, and, frequently, to imply a warranty from acts and circumstances whenever relied upon by the buyer. The old doctrine of *caveat emptor*, which ruled supreme two centuries ago, has been losing ground constantly from the days of Lord Holt, and in our time has almost given away to the *caveat venditor* of the civilians. From the case of *Chandelor* v. *Lopus*, Cro. Jac. 4, where the defendant affirmed a stone to be bezoar stone, and, as there was no *scienter* in the declaration, it was held that there was no cause of action, because no fraud alleged, to the case of *Henshaw* v. *Robbins*, 8 Metc. (1845), in which an article was sold as Manila indigo to a druggist, who carefully examined it and accepted it as such, and afterwards held the vendor liable because the article sold was prussian blue, chromate of iron, and potash, so skillfully

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compounded as to deceive experts, there has been a great change. It is now the generally received doctrine that any affirmation made by the vendor at the time of sale, in relation to the goods sold, is a warranty, if so meant by the seller and understood by the buyer—that is, if it be the affirmative statement of a material fact, and not the mere expression of opinion.

What did the vendor here sell? A promissory note, a first lien on real estate. But the note sold was not a first lien on real estate; and that it should be a first lien was the most material thing in the bargain. It is as the case where one sold a copper-fastened ship, taken with all her faults, without allowance for any defects whatever, and she was proved to be only partially copper fastened. This was taken to be a breach of warranty that she was at least copper fastened. *Shepherd* v. *Kain*, 5 B. & Ald. 240. Her faults must be consistent with her being copper fastened throughout. No reliance was placed here upon the maker of the note; it was not claimed that he was solvent, punctual, or honorable. The vendor placed so little reliance upon his meeting the note when due that he insisted upon indorsing the note "without recourse," evidently anticipating that the land alone must be looked to to pay the debt.

The words "without recourse," annexed to defendant's indorsement, only exempt him from that liability on the note, in case of its dishonor at maturity, to which he would otherwise be subject by the law-merchant. They do not exempt him from the obligation he is under, in case the instrument turns out not to be genuine, to return the money paid for it by one to whom it is sold; nor in case of a real-estate note, where all other circumstances point to a warranty that it is a first lien, does this form of indorsement give a different color to the transaction. *Frazer* v. *D'Invilliers*, 2 Barr (Penn.), 200. It only shows that the indorsee was by no means assured that the paper would be taken up at maturity by the maker.

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The law of this case seems to have been correctly given to the jury. If the jury found all the facts set out in the instructions asked by plaintiff, there could be no question that a representation was made as to a material fact, which was understood at the time and accepted as a warranty; and this seems to be sufficient to hold the vendor, although in good faith and innocently mistaken.

That this was not a case of guaranty is clear enough. It cannot be said that one transferring a note "without recourse" intends to guarantee that the maker will pay it when due, or that he could have been so understood by the person taking the note; but it by no means follows that he did not, therefore, warrant that the note was genuine, or that it was secured in a particular way, or that, as in the case at bar, it was a first lien. Neither was it necessary that plaintiff should in terms charge in his petition that defendant warranted the truth of his statements, or that his liability was that of a warrantor. The petition alleges a representation and a positive and unequivocal affirmation of certain facts on the faith of which plaintiff received certain notes. No particular phraseology need be either set out or proved. *Carter* v. *Black*, 46 Mo. 384. If one who makes a representation to effect a sale, stating the same absolutely as a fact, which representation is material, and is relied upon and acted on by the other party as true, must, if the same be untrue, make good to the other party what he has lost by reason of that misrepresentation, although the party uttering it believed it at the time to be true, then there is no substantial error in this case, and the judgment is for the right party and must be affirmed. *Baker* v. *Scudder*, 56 Mo. 272, and *Carter* v. *Black*, 46 Mo., seem fully to warrant the conclusion that the facts of this case were enough to fix the liability of defendant.

This case does not present an action *ex delicto*, founded on false and fraudulent representations, and it is not essential to a recovery that it should. The form of pleading on

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a warranty was changed from *tort* to *assumpsit* in the days of Lord Mansfield, and the form of declaring in *assumpsit* discussed and regularly established as the proper form in cases of express warranty. In *Stuart* v. *Wilkins*, 1 Doug. 19, Lord Mansfield declares that he found this sort of declaration, where warranty was to be proved, had been practiced already for more than twenty years, to let in both proofs if necessary; and, as the distinction between cases of express and implied warranty was soon reduced to merely the kind of proof necessary to establish the one or the other, the distinction between the two kinds of warranty became wholly formal.

The honesty of intention with which the false declaration is made is no more material, in the present condition of the law on this subject, in an action on the warranty, than in a proceeding in chancery to avoid the contract. The contrary position is taken by learned counsel for appellant, and is very ably defended by them; but, in view of the current of modern decisions, the position is essentially untenable, and, if ever held in Missouri, has ceased to be the law.

In case of a warranty of quality of an article it frequently becomes a question for a jury whether certain representations amount to a warranty, and were so understood by the parties, or were a mere commendation by the party of his wares. But it could hardly be necessary, in the case at bar, to ask the jury to say, in so many words, whether the statement that the notes in question were first liens on real estate was the affirmance of a material fact or a mere expression of opinion. Whether a note is equivalent to cash may perhaps be a matter of opinion; but whether it is a first lien upon certain described real estate is not at all a matter of opinion, but a matter of fact, and, if such a statement was made and accepted under the circumstances set forth in plaintiff's instructions, such a statement was a warranty as a matter of law, and it was not necessary explicitly to sub-

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mit to the jury the question of the intention with which it was made.

The first instruction asked by defendant was properly refused, because there was no question of fraud in the case.

The second and third instructions were based upon the idea that the representations must be known to be false when made, to create a liability, and were properly refused as utterly inconsistent with those given.

The fourth instruction is not supported by the evidence; but if Smithers had been in as good a position as defendant he might still have safely relied upon the representations of defendant as to priority of lien.

The fifth instruction asked by defendant was perhaps based upon the fact that the principal Graves note was not due when this verdict was rendered, and that the note itself was pledged by Smithers. But, as this suit is not on the note, but upon the representations made by defendant in relation to it, the fact that the note was not due when judgment was entered is no bar to recovery. Nor is there anything in the objection that plaintiff had pledged the note to secure fulfillment of the agreement as to payment of the premiums in gold. This objection would not be tenable even in a suit on the note, for the general property in the note remained in Smithers after the pledge. He might have transferred the note, subject to the lien, and he could sue on it in his own name.

No error appearing in this record for which the judgment of the Circuit Court should be reversed, it is affirmed, with the concurrence of all the judges.

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MARGARET DINGEE, Appellant, *v.* MARY KEARNEY *et al.*, Respondents.

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June 19, 1876.

1. In case of proceedings in the General Court of St. Louis, of date 1806, everything found in the office of the clerk, with the papers, and manifestly relating to the case, is a part of it; and all such papers and entries purporting to prove the record of the cause, though not signed by the presiding judge, are admissible to prove what was done during its progress.

2. After the lapse of seventy years the issuing of necessary process and service will be presumed, to support a judgment of that antiquity.

3. In case of a sheriff's deed, seventy years old, though the record of the deed does not show a seal, yet where the deed has been followed by undisturbed possession a seal will be presumed.

APPEAL from St. Louis Circuit Court.

Affirmed.

D. T. Jewett and *N. Holmes*, for appellant, cited: Reaume *v.* Chambers, 22 Mo. 53; Beale *v.* Lynn, 6 Har. & J. 351; Ricard *v.* Williams, 7 Wheat. 109; Stillman *v.* W. R. Mfg. Co., 3 Woodb. & M. 549; Downing *v.* Ford, 9 Dana, 393; Crocker *v.* Pendleton, 10 Shep. (Me.) 339; Battles *v.* Holley, 6 Greenl. (Me.) 145; Mellen *v.* Locks & Canal Co., 17 Pick. 260; Karl *v.* Lawrence, 73 Pa. St. 416; Brunswick *v.* McKean, 4 Me. 570; Ferris *v.* Brown, 3 Barb. 105; Warfield *v.* Lindell, 38 Mo. 578; 2 Greenl. on Ev., sec. 537; Digby's History of the Law of Real Prop. 129; Little *v.* Chauvin, 1 Mo. 626; Landes *v.* Perkins, 13 Mo. 238; Youse *v.* Norcum, 12 Mo. 562; Newman *v.* Studley, 15 Mo. 291; McNair *v.* Hunt, 5 Mo. 310–312; Hepburn *v.* Aull, 5 Cranch, 276; Adams *v.* Buchanan, 49 Mo. 71; Ryan *v.* Carr, 46 Mo. 483; Scruggs *v.* Scruggs, 41 Mo. 242; Allen *v.* King, 35 Mo. 225; Allen *v.* Moss, 27 Mo. 364; 1 Ter. Laws, 120, sec. 47; Clark *v.* Hammerle, 27 Mo. 70; Hannibal & St. Jo. R. R. Co. *v.* Sawyer, 37 Mo. 263; Littleton *v.* Patterson, 32 Mo. 357; Wag. Stat. 917, secs. 8, 9; Bobb *v.* Woodward, 50 Mo. 103; May *v.* Rumney, 1 Mann. (Mich.) 1; Practice Act of Oct. 1, sec. 1804,

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7 (1 Ter. Laws 56); Acts concerning Courts, of Oct. 1, 1804, secs. 8–10, 24 (1 Ter. Laws, 60–61); Act of Oct. 1, 1804, sec. 2 (1 Ter. Laws, 65); Act of Oct. 1, 1804, sec. 7 (1 Ter. Laws, 56); Act of Oct. 8, 1806, sec. 5 (1 Ter. Laws, 89); 1 Ter. Laws, 62, secs. 17, 109, 59; Act of Oct. 8, 1806, sec. 2 (1 Ter. Laws, 88, 89); 3 Inst. 173, 1 Greenl. on Ev., secs. 501, 508; Gray *v.* Davis, 27 Conn. 447; Strong *v.* Bradley, 13 Vt. 14; Pike *v.* Crehore, 40 Me. 503, 514; Willard *v.* Harvey, 24 N. H. 344; Ferguson *v.* Harwood, 7 Cranch, 412; Fithian *v.* Monks, 43 Mo. 502; Gibson *v.* Foster, 2 La. An. 508; Janney *v.* Spedden, 38 Mo. 395; Chauvin *v.* Wagner, 18 Mo. 554; Youse *v.* Norcum, 12 Mo. 564.

A. Hamilton and *S. Reber*, for respondent, cited: Reaume *v.* Chambers, 22 Mo. 53; Beale *v.* Lynn, 6 Har. & J. 53; Landes *v.* Perkins, 12 Mo. 254; Ryder *v.* Cohn, 37 Cal. 69; Ludlow's Heirs *v.* Wade, 5 Ohio, 500; Stevenson's Heirs *v.* McReary, 11 Smed. & M. 46 *et seq.*; Best on Presumptions, secs. 109-111; Rey *v.* Buckley, 7 East, 45; 1 C. & H. Ph. on Ev. (1868) 561, note 13; St. Mary's College *v.* Attorney General, 3 Jur. (N. S.) 675; 1 Greenl. on Ev. (1866), sec. 46; Williams *v.* Donald, 2 Head, 695; Griffin *v.* Sheffield, 38 Miss. 359; Williams *v.* Bass, 22 Vt. 364; Fox *v.* Thompson, 31 Pa. St. 172; Kaul *v.* Lawrence, 73 Penn. 416; McKeon *v.* Railroad Co., 43 Mo. 405; Taylor *v.* Dougherty, 1 Watts & S. 327; 1 Ter. Laws, 61, sec. 12; Cooley's Const. Lim. 406; Harvey *v.* Tyler, 2 Wall. 340; Dunbar *v.* Hallowell, 34 Ill. 169; Osgood *v.* Blackmore, 59 Ill. 261; Whiteside *v.* Barker, 7 Cal. 54; Peck *v.* Strauss, 33 *Ib.* 679, 685; Drake *v.* Duvenich, 45 Cal. 445, 463; Newman *v.* Cincinnati, 18 Ohio, 331; Knapp *v.* Abde, 10 Allen, 488; Marburg *v.* Madison, 1 Cranch, 161; Osborn *v.* The State, 7 Ohio, 214; 1 Whart. Penn. Dig. 801; Jewell *v.* Commonwealth, 22 Penn. 94; Davidson *v.* Slocum, 18 Pick. 466; Miller *v.* Handy, 40 Ill. 452; McNair *v.* Hunt, 5 Mo. 309.

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BAKEWELL, J., delivered the opinion of the court.

This was a suit for dower. The plaintiff made out a *prima facie* case by proof of the title and seizin of the husband during the marriage, and of his death.

The defendants denied seizin of the husband, and also pleaded certain facts, by way of special defense, to show a bar by limitation. To this special defense plaintiff demurred, and her demurrer was sustained.

On the trial, to defeat the seizin of the husband, defendants endeavored to show that the land in question had been previously conveyed by Grégoire Sarpy, the father and ancestor of plaintiff's husband, to one Joseph Robidoux (under whom defendants claim), by sheriff's sale, in October, 1807, upon a judgment and order of sale rendered on May 22, 1807, in a suit of *Antoine V. Bouis* v. *Grégoire Sarpy*, for the foreclosure of a Spanish mortgage, given in 1803, which suit was commenced by filing a petition, on October 30, 1806, in the General Court of the Territory; and they produced in evidence a certified copy of the proceedings and judgment in said cause, and also a certified copy of an instrument purporting to be a deed, by the sheriff, of said land, as the property of Grégoire Sarpy, to the executor of Joseph Robidoux, deceased, in pursuance of said sale, dated November 13, 1809. Defendant also produced in evidence the record book of the Court of Common Pleas of the District of St. Louis, showing an entry made, on November 13, 1809, of an acknowledgment in open court, on that day, by said sheriff, of a deed for the land sold and therein described, to the executor of Joseph Robidoux, deceased. To the admission of the record of judgment in *Bouis* v. *Sarpy* plaintiff excepted, for the reason that said record did not show any legal evidence of the issue and service of process upon defendant therein, nor of his appearance in person or by attorney. Plaintiff also excepted to the admission of said record entry of an acknowledgment of the deed by the sheriff in open court,

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without also producing the deed with such acknowledgment duly certified thereon by the clerk, under the seal of the court.

Plaintiff objected to the admission of the sheriff's deed, when produced, for the reason that the acknowledgment had not been certified thereon by the clerk, under the seal of the court taking the acknowledgment, as required by the statute then in force; and also for the reason that said judgment and order of sale were void for want of jurisdiction of defendant therein without service or appearance.

The sheriff's deed was admitted, subject to instructions, and, at the close of the case, the following instruction was given for the plaintiff, on the subject of this deed:

"The jury are instructed that, if they believe from the evidence that there was no seal to the clerk's certificate of acknowledgment of the sheriff's deed offered in evidence by defendants, then said deed was void and passed no title; and, further, that such defect cannot be supplied or cured by the record entry of such acknowledgment in open court."

An agreed statement of facts was read by plaintiff, in which it was admitted that the defendants, and those under whom they claim, had been in the actual adverse possession of the premises in question ever since January 1, 1824, claiming title thereto under the said sheriff's sale. Defendants also offered evidence tending to show that Grégoire Sarpy, from the time of said sale and deed down to his death, in 1824, had continued to reside in the town of St. Louis without bringing any suit to recover the possession of said land, or otherwise interfering with the possession thereof, and that the adverse possession had been with his knowledge.

The claim for the lot in question was presented before Recorder Hunt, in 1825, under the act of Congress of May 24, 1824, and the certificate of confirmation was issued on November 25, 1825, to Sarpy's legal representatives. Sarpy

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was then dead; but Hempstead, under Robidoux, was then, and had long been, in possession, claiming the lot to the exclusion of all others.

It was admitted that all the title acquired by Robidoux was vested by derivative title in the defendants.

Defendants also offered in evidence a mortgage, dated October 6, 1807, from Joseph Robidoux to Antoine V. Bouis, of lot claimed by defendants to include the land in controversy, to secure a debt to said Bouis, due from said mortgagor, on which was indorsed a receipt, by Robidoux to Bouis, of 1,867 livres, in deer skins, on May 24, 1809. This instrument was objected to by plaintiff as irrelevant.

Defendants also offered a certified copy of proceedings in insolvency in the matter of Gregoire Sarpy, showing that he had been discharged from arrest for debt, upon the filing of an inventory dated January 12, 1808, in which the lot in question was not mentioned. This instrument was objected to by plaintiff as irrelevant.

The court gave all the declarations of law asked by the plaintiff, and refused all asked by the defendants except two.

The two instructions given for defendants are, in substance, the same, and declare the law to be "that the record of these proceedings read in evidence, in the case of *Bouis* v. *Sarpy*, in the General Court, together with the entry on the record of the Court of Common Pleas for the District of St. Louis, on November 13, 1809, of the acknowledgment by sheriff, in open court, of a deed for the land therein described, to the executor of Joseph Robidoux, furnishes evidence, if the possession of the land has ever since gone with the supposed deed, that there was a sale, by the sheriff, of the land of Grégoire Sarpy, under the judgment or order of sale in the case of *Bouis* v. *Sarpy*, above recited; that Joseph Robidoux was the purchaser thereat, and that the sheriff executed and delivered to the executor of Robidoux a deed for the land described in said certificate of acknowledgment."

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Plaintiff excepted to the giving of these instructions.

It will not be necessary, for the purposes of this opinion, to set out the declarations of law given at the instance of plaintiff, further than to say that the court completely negatived any theory that evidence that those under whom defendants claim took possession of the land with Grégoire Sarpy's knowledge, and he made no sign, though continuing to reside in St. Louis till 1824, would prove a verbal sale from him, or estop him or his heirs, or be any defense to this action.

The cause was tried by the court without a jury, and a verdict and judgment entered for defendants. A motion for a new trial having been overruled, the cause is brought here by appeal.

There is no substantial error in the declarations of law given by the court in this case, and the verdict and judgment, being for the right party, will not be disturbed if it shall appear:

1. That the so-called record of the proceedings in *Bouis* v. *Sarpy* is admissible for any purpose.

2. That the court, in that case, had jurisdiction of the parties to the suit, and of the subject-matter.

3. That, no deed whatever appearing from the sheriff to Robidoux's executor, there exist record entries from which, coupled with long possession, a deed may be presumed.

4. That, though the paper offered in evidence as a certified copy of a record of an instrument of writing from the sheriff to Robidoux's executor does not show on its face any copy of a seal, it may be presumed, under all the circumstances of this case, that the original instrument, of whose record it purports to be a copy, had, when filed for record, the proper seal attached to the clerk's certificate.

We shall examine these points in their order, and, if they are solved, as we think they must be, in favor of defendants, it will be difficult to assert any valid reason for disturbing this judgment.

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1. The evidence of the proceedings in *Bouis* v. *Sarpy* was a transcript of the entries in the record book of the General Court of Oyer and Terminer, and general jail delivery, held at the town of St. Louis, in the Territory of Louisiana, on Tuesday, October 28, 1806, together with the original papers in the case, all kept together. These are not marked "filed," as is the present custom, but they are produced from the files of the court by the present clerk of the Supreme Court, the actual custodian of these records. Accompanying this bundle of papers is a complete history of the case, engrossed by the clerk of that day in his own hand-writing, and indorsed, "record."

Joseph F. Baier, deputy clerk of the Supreme Court, swore that the papers produced by him in court were the original book of record entries and the original roll of papers on file in said cause in the clerk's office of the Supreme Court; that the paper purporting to be a draft of pleas, drawn up in form, was not marked "filed," nor entered in any record book of entries preserved in the office, nor signed nor certified by the clerk; that he had examined the records and files of said General Court from 1805 to 1809, and it appears to have been the custom of the clerks to make out a statement or history of the whole cause and put it on file. It was never marked "filed," but was indorsed "record," as in this case. In 1805 a regular record book was kept. There was no minute book among the records. This transcript or draft of pleas was not entered or copied into any record book now in the office of the clerk; nor was the "notice" marked "filed," but it was amongst the papers in the case as put and kept together. The draft of pleas and the indorsement of "record" thereon was in the handwriting of Joseph V. Garnier, then the clerk of said General Court, and the "letter of notice" and indorsement thereon was in his handwriting.

The record begins in solemn form:

"Pleas in the General Court of the Territory of Louisi-

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ana before the judges of said Court at St. Louis of the term of May in the year of our Lord one thousand eight hundred and seven. Witness the Honorable John B. Lucas, Esquire, Presiding Judge of the said Court at St. Louis. J. V. Garnier Clerk. Be it remembered that heretofore to wit on 30th October at the Term of October A. D. 1806," etc.

It then sets forth that Antoine Vincent Bouis presented his petition against Grégoire Sarpy, and Palazie, his wife, and the original petition is set forth in French. Then follows the mortgage, at length, in the original Spanish; the notice to defendants to appear is then set out, and a continuance noted to next term. The record then sets forth that both parties, plaintiff and defendant, appeared in person at the next term, and the order of publication and of sale are noted, with full details of each, and also the entry of judgment and issuing of execution.

These records seem to be original and authorized minutes. They are in the custody of the proper officer, produced and proved by him, and, together with the file of papers accompanying them—including the execution, with the seal of the court and the signatures of the presiding judge and clerk, on which is indorsed the return of the sheriff, the original citation, and return upon it—seem to form an authentic and complete record of proceedings in this cause. Considering the state of society in this locality at the date of these proceedings, the radical changes which were then taking place in the form of legal proceedings, and all the surroundings of this case, we should not be justified in holding that, because we have before us no record signed by the presiding judge, as required by the act of October 1, 1804, in force when these proceedings were had, therefore there is no sufficient evidence of the facts set forth in these papers. On the contrary, we hold that everything found in the office of the clerk, with the papers and manifestly relating to the case, is a part of it; and all these entries and papers, including the citation, returns, pleadings,

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and all other proceedings, constitute the record of this cause, and are admissible to prove what was done during its progress. *The State* v. *Logan*, 33 Md. 8; *Jewell* v. *The Commonwealth*, 22 Penn. 94.

2. The General Court was a court of general jurisdiction, and was in this case acting upon a subject-matter within the scope of its general powers. There is a presumption of law that it had jurisdiction over the parties. The citation issued in the cause is entitled of the case, with the words "General Court" for the style of the court. It sets forth that the petition has been filed by Bouis, and its general object; it is addressed "to Grégoire Sarpy and wife," and signed "J. V. Garnier, clerk," and has the following indorsement, in the handwriting of the clerk: "General Court, *Vincent Bouy* v. *Grégoire Sarpy and wife.* On petition. Notice. Served 31st October, 1806. J. V. Garnier." We do not see that this rebuts the legal presumption in the case. There was no provision of law, at this time, that the original process should be a summons directed to the sheriff, and served fifteen days before the return day. It is true that all writs, process, and summons, issuing from the General Court, were then required to be signed by the clerk and *tested* by the presiding judge; but it may well be maintained that the citation or rule to show cause in this case was not process within the terms of the statute. *Taylor* v. *Henry*, 2 Pick. 398. At any rate, the court, in the plenitude of its power over the matter, adopted this form of giving notice, sanctioned it, acted on it; and it further appears from the recitals filed amongst the papers that, after the general imparlance entered in the cause, "before the judges of the General Court aforesaid came as well the said Vincent Bouis, by his attorney, as the said Grégoire Sarpy, in his own proper person," so that we have no doubt that the court had jurisdiction, But, had that matter not appeared, and had we considered the citation and returns insufficient, we could, if necessary to support

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the judgment, have presumed, after the lapse of seventy years, the issue of any necessary process, and its service in due form.

3. Had no deed whatever appeared from the sheriff, we should not, in view of the record entry of the acknowledgment of the deed in open court, have considered ourselves warranted in overturning a sheriff's sale thus witnessed, and followed by possession for seventy years. *Newman* v. *Studley*, 5 Mo. 291.

4. But it is insisted by plaintiff that there is in the way a difficulty that cannot be overcome, and which *Newman* v. *Studley* does not tend to remove; that we have in evidence a deed, but a deed radically defective on its face; that the clerk's certificate of acknowledgment indorsed on the instrument is an essential part of it, and it is error to receive it without this indorsement. *Adams* v. *Buchanan*, 49 Mo. 64. It is true that there can be no presumption in favor of the validity of a title which, on its face, is manifestly illegal and void. *Reaume* v. *Chambers*, 22 Mo. 36. But is it clear that the deed of Sarpy, by the sheriff to Robidoux, offered in evidence, is illegal? It is made in proper form, contains the customary recitals, and is signed and sealed by the sheriff. The defect, if any, is in the clerk's certificate to the fact of acknowledgment by the sheriff in open court. This certificate is held, in Missouri, essential to the validity of the deed, although, after all, it is mere evidence of a fact which might have been capable of proof from the record of the court itself. We have the record in this case; but, under the law in Missouri, that is not sufficient evidence of the fact.

The original deed of the sheriff was not produced, but in its stead a certified copy of the record of that deed. In this certified copy the certificate of the clerk of the Court of Common Pleas to the sheriff's acknowledgment ends with these words: "Dated at St. Louis, the 14th November, 1809. Thomas F. Riddick."

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Nothing is said about a seal in the *testatum* clause. But this does not prove that a seal was not there. It is not necessary to mention the seal when it is there; it becomes necessary to mention it only when its place is supplied by a flourish of the pen, or something of that sort. The seal may, therefore, have been to the original deed. The clerk ought to have affixed it. It was his bounden duty to do so. The recorder may not have copied it. Why should he copy it? It is most probable that the impression of the seal of the court was so faint upon the paper that no words and no device were legible, and that for that reason it was not copied, nor its presence indicated. As a matter of fact, the question not having been at that date judicially determined, the recorder, had he been a lawyer, could not have known the importance of this certificate and this seal. In *Griffin* v. *Sheffield*, 38 Miss. 359, it is held that the registry acts do not contemplate the recording of the impression of a seal. In *Williams* v. *Bass*, 22 Vt. 352, the court says that there can be no doubt upon the authorities that, where the deed has been followed by possession, the court should presume that the seal had been accidentally removed, or that the recorder, in recording it, had, through inadvertence, omitted to indicate on the record that the deed was sealed. Where a deed is produced, purporting to have been executed by signing and sealing and delivery, but the attesting witnesses can speak only to the fact of signing, it may be properly left to the jury to presume a sealing and delivery. *Bowling* v. *Patterson*, 9 C. & P. 570; 1 Peake, 146; 7 Taunt. 251.

Such presumptions as these are presumptions mixed of law and fact; they are artificial presumptions; and, where the inference is only partially approved by reason, the law, from motives of policy, attaches to the facts, which give rise to the presumption an artificial effect beyond their natural tendency to produce belief. There can hardly be any stronger motive of policy than the desire to uphold

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titles which have been followed by an undisturbed possession, under claim of absolute ownership, for the better part of a century, as in the case at bar. It is shocking to every sense of right and security of property that a possession of seventy years should be disturbed for want of a particular mode of proof of the existence of a fact which reason tells us must have occurred. Who doubts that Sarpy's mortgage was foreclosed; that Sarpy knew it, and knew that all his legal title to this land was gone? The property was clearly sold, and the proceeds applied to pay his debt. He acquiesced until his death. Shall his legal representatives retain the land and the money both, in the name of their ancestor? No. If ever a case occurred in which every presumption would be indulged to support a title, this is one. *Ex diuturnitate temporis, omnia præsumuntur rite et solemniter esse acta.*

Whether, then, we consider the sheriff's deed as a legal nullity and so much blank paper, or whether we presume it to have been sealed, the effect is the same. In the first place the deed itself will be presumed, none having been shown; in the second case we have a good deed and a perfect title. In any case judgment was properly entered for the defendant, and, with the assent of Judge LEWIS, it is affirmed. Judge GANTT, having been of counsel, does not sit.

MARY L. TYLER, Respondent, *v.* WILLIAM WELLS *et al.*, Appellants.

June 26, 1876.

There being an interference between two approved surveys made by the United States, one made in 1851, of a confirmation made by the old board of commissioners in 1810, and the other in 1817, of a confirmation made of a lot in the common field of St. Louis by the 2d section of the act of April 29, 1816, *held*, that the title under the survey, made in 1851, of the

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confirmation made in 1810 was the better, for two reasons: 1. Because the survey of 1851 had relation to the confirmation of 1810, and so was prior to the confirmation of 1816. 2. Because the express terms of the act creating the confirmation of 1816 excludes from its operation whatever had been previously confirmed by the board of commissioners.

APPEAL from St. Louis Circuit Court.

Affirmed.

Glover & Shepley, for appellants.

Britton A. Hill, for respondent.

GANTT, P. J., delivered the opinion of the court.

This was an action of ejectment commenced in 1857. The plaintiff deduced title from a confirmation, in 1810, by the old board of commissioners, to Labeaume. The location of this confirmation was the subject of much controversy. A survey made in 1851 was approved in that year, and a patent was issued in accordance with it in 1852. Immediately on its issue, litigation, which had been commenced before, assumed a new shape as to the rights of the owners of the Brazeau reservation of four by four arpents. These owners claimed that this reservation lay within the survey for Labeaume.

The owners of the latter contended that the reservation lay to the south of Labeaume's survey. This contest was finally determined, 1873, by the decision of the Supreme Court of the United States. *Tyler* v. *Maguire*, 17 Wall. 253, and following. The survey approved in 1851 embraced much more land than had been included in any previous survey of this confirmation. This came to pass by reason of its being at last made to conform to the lines of the original survey made to Labeaume under the government of Spain. The grant made by the lieutenant-governor to Labeaume was declared, on its face, to contain 374 arpents of land, and it was for this area that Labeaume had filed his petition. It was surveyed for him by the *agrimensor* (surveyor) of that day, and the grant, with the survey, were laid before the board of commissioners as the foundation of Labeaume's

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title to a confirmation. The board confirmed to him 356 arpents, and four arpents to Brazeau, and ordered the confirmation to Labeaume to be surveyed "agreeably to the concession from Zenon Trudeau to Labeaume, and, as respects the four arpents, agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume." Looking back to the concession made by Trudeau, we find it designated by the Spanish survey made April 10, 1799. It included both the land belonging to Labeaume and the reservation, not of four arpents, but of *four arpents square*, or sixteen arpents, reserved to himself by Brazeau when he made a sale to Labeaume, on May 9, 1798, of the residue of a grant of four by twenty arpents made to Brazeau on June 25, 1794.

It must be borne in mind that in the days of the Spanish government the order of events in obtaining a grant of land was, (1) a petition to the lieutenant-governor for a tract of land with a more or less definite description; (2) an order by the lieutenant-governor to the surveyor to put the petitioner in possession of the land claimed, if it were part of the royal domain; (3) a certificate made by the surveyor or *agrimensor* that the land asked for was unappropriated, with a figurative plat of it, very seldom with accurate or detailed field notes; (4) a reference of the whole matter to the governor-general, at that time residing in New Orleans; and (5) a complete grant by him to the petitioner.

In the immense majority of cases the complete grant from the governor-general was not obtained, and, what has always been familiarly known in Missouri as "a French or Spanish grant" was nothing more than this preliminary order of the lieutenant-governor to the surveyor, followed up, as it almost invariably was, by the surveyor's return, giving definiteness to the sometimes vague grant or permission to occupy in anticipation of the complete grant from the governor-general. This last officer had vice-regal pow-

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ers, and a grant by him, before the change of government, was as effectual as a patent from the United States after that event. But the permission to occupy given by the lieutenant-governors, or military commandants of the various posts did not convey title to the petitioners. They contained, for the most part, a declaration that these preliminary measures were intended to facilitate the grant of a complete title by the governor-general. The instances in which a complete title was thus obtained were very few. Within the old limits of the town of St. Louis there was not a single case of such a title, perhaps not one within the present limits. North of the St. Louis common field was one such grant to Cerré (S. 2042), and west of what is still called "King's Highway" (*Chemin du Roi*, or *El Camino del Rey*) were two such grants to Charles Gratiot. There were a few others, but only a very few.

Almost without exception the figurative plat returned by the surveyor, and ascertainable on the ground by stones or other fixed monuments at the corners, contained a larger area than was prayed for by the petitioner. This was the case with the survey of Labeaume. It contained more than 374 arpents. If it had contained 374 arpents, and no more, there would still have been, after satisfying the reservation to Brazeau of sixteen arpents, 358 for Labeaume. As we have seen, the board confirmed to him 356 arpents only, speaking by quantity, but referred, for ascertainment of the land confirmed, to the concession and survey executed under the Spanish government, and at the same time declared (we interpret this document by the light of the decision of the Supreme Court of the United States above quoted) that Brazeau's reservation, part of this concession, was also confirmed to him, amounting to four arpents square, or sixteen arpents. The earlier surveys of this confirmation were mistakenly confined to 372 arpents (or 356 plus 16), and the western line of these earlier surveys was made parallel with the western line of the old Spanish survey.

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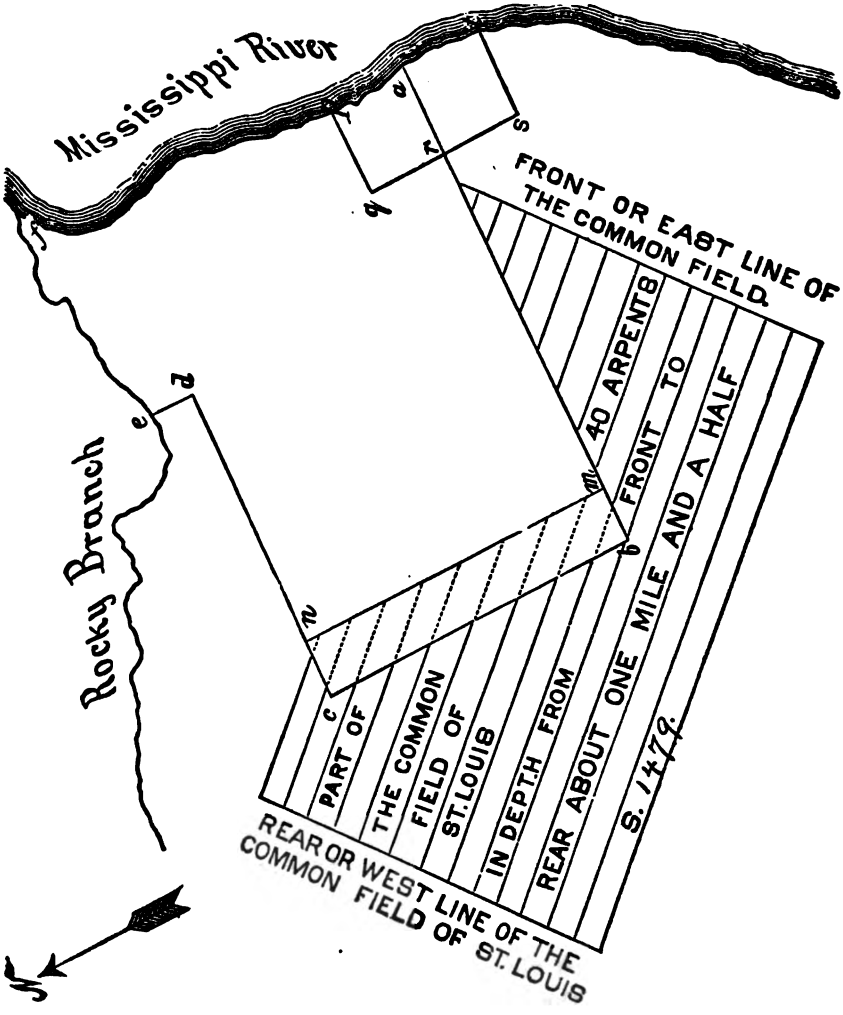

[*a b c d e f a* is the tract embraced within the Spanish survey for Labeaume, made by Soulard in 1799, and resurveyed in 1851, to satisfy the confirmation of 1810. This is United States survey 3333. *a m n d e f a* is the tract embraced in one or more surveys of the same confirmation (surveys 982 and 2974), made before 1851, and disapproved by the land office. *b c n m b* is the parallelogram included

in the Spanish survey of 1799, and the approved United States survey of 1851, but excluded from surveys 982 and 2974. *a p q r a* is the tract of four arpents square surveyed as directed by the Supreme Court of the United States, *Maguire* v. *Tyler*, 8 Wall. *a r s t a* is the tract of four arpents square, as erroneously located by the direction of the secretary of the interior in 1851. Survey 1479 is the common field confirmed to Lirette by the act of April 29, 1816.]

This western line was oblique to the east and west lines of the St. Louis common field. The north and south lines of the Labeaume survey, being perpendicular to its western line, were also oblique to the north and south lines of the common-field lots. It is easy to construct a diagram indicating the old and new surveys of the Labeaume confirmation, and such a diagram is filed with, and made part of, this statement. It should be noted, however, that Labeaume's representatives always claimed that 356 arpents were to be laid off to them in a diagram without re-entrant angles, and that Brazeau's reservation was to be laid out directly to the south of, and adjoining to, the southeast corner of it, thus putting the reservation *outside of* the tract from which it was carved. The claimants under Brazeau contended that the two confirmations were to be surveyed, first, for the ascertainment of the whole tract, including the reservation to Brazeau and the extended grant to Labeaume, and that within this large tract, and at its southeast corner, the reservation of four by four arpents to Brazeau was to be laid off. This last view, which was the only one consistent with the calls of the various documents relating to this complicated subject, was finally affirmed by the Supreme Court of the United States, as before mentioned, in 1873 (17 Wall. 253). Indeed, the matter had been substantially settled some years before (8 Wall. 669). Several surveys, made in the attempt to conciliate the conflicting views of the contending parties, between 1810 and 1851, were successively made and set aside. In all these more attention was

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paid to the designated area of the tract confirmed than to the corners of the old Spanish survey, and a parallelogram included between the north and south lines of that survey, its western line, and a line parallel with and some distance to the east of this western line, though within the Spanish concession, was by the earlier surveys left out of the survey of the confirmation of the claim by the United States. When, in 1851, the commissioner of the general land office, in obedience to the decision of the secretary of the interior, ordered the lines of the old Spanish survey for Labeaume to be retraced, and approved the survey thus made as the correct designation of the land confirmed to Labeaume, there was added to the tract this parallelogram, which invaded the common-field lot confirmed to the representatives of Lirette by the act of April 29, 1816, and for this interference the present suit was instituted.

The owners of the Lirette confirmation contended that, as the 1st subdivision of the 2d section of the act of April 29, 1816, operated a complete investiture in the confirmee of the title to the land confirmed by that act, and as, according to the letter of the decision in *West* v. *Cochran*, 17 How. 403, "until the survey was made the confirmee's title attached to no land" (p. 416), in the case of the confirmation to Labeaume, the confirmation to the legal representatives of Lirette was in fact the first appropriation of the land within the interference. As we have seen, the first approved survey of the Labeaume confirmation was made in 1851. The act of April 29, 1816, operated a complete investiture of title in the confirmee. There was much plausibility in the argument that the fee as to the interference passed by act of Congress to the representatives of Lirette, thirty-five years before the United States appropriated it to the satisfaction of the confirmation to Labeaume, and that the decisive answer to this pretension has not been made after the end of nineteen years is evidence that such an answer is not obvious. So far as any tribunal short of the Supreme Court of the United States

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can make any such answer it has been made in this very case by the Supreme Court of Missouri (57 Mo. 472), which decides the title under the confirmation of 1810, surveyed in 1851 and perfected by patent in 1852, to be better than that which was perfected in 1816. By the decision cited, the first judgment rendered in this case in favor of the title under the act of 1816 was reversed, and the cause having been tried again by the Circuit Court in conformity with that opinion, and decided this time in favor of the plaintiff, comes before us on appeal with the ultimate design, as we learn, of taking the opinion of the Supreme Court of the United States.

We have a full assurance of the correctness of the conclusion reached by the Supreme Court of the State of Missouri on this subject. That conclusion is principally reposed on the well-known doctrine of relation, and this would in our judgment be enough to justify that conclusion. But, if we are not mistaken, there is another and more direct reason for it, and, as it has not, so far as we are aware, received judicial notice up to this time, we consider it proper to state it here.

In all the legislation of Congress looking to the confirmation of inchoate or imperfect rights or claims to land in the Territory of Louisiana, acquired from France by the treaty of 1803, scrupulous care was taken not to prejudice, by subsequent enactments, any right already existing. In the act of 1807, amendatory of the act of 1805, the first of the series on the subject, section 3, confirming the claim of the city of New Orleans to common, was careful to provide that nothing therein contained should "be construed to affect or impair the rights of any individual or individuals to the said common, which are derived from any grant of the French or Spanish government." This being the first act of Congress on the subject, the only reference to preexisting rights was to such as originated under the government through which the United States claimed the territory. Under this act the confirmation to Labeaume was made.

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The next legislation on this subject was the act of June 13, 1812. The 1st section *ipso facto* confirmed to the rightful claimants thereof "all town or village lots, out-lots, common-field lots, and commons in, adjoining, or belonging to" certain towns and villages in Missouri, of which St. Louis was one, which had been "inhabited, cultivated, or possessed prior to December 20, 1803;" "provided, that nothing herein contained shall be construed to affect the rights of any persons claiming the same land, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory." The language used here varies, but only very slightly, and not to the change of the sense, from that used in the act of 1807. There the words "affect or impair" were used; here the word is "affect" only. Some remarks occur later in this opinion on this head. At present we pursue the examination of the statutes, the next of which in order is the act of April 12, 1814. Here, after declaring under what conditions a confirmation shall be given, there comes a proviso that "no confirmation made by this section shall affect the rights of any person claiming the same land, or any part thereof, whose claim has been confirmed by a board of commissioners for ascertaining and adjusting claims to land in said State or Territory, nor preclude a judicial decision between private parties in such interfering claims."

The next act is that of April 29, 1816. This act, in express terms, provides for the confirmation of a certain class of claims, under the terms and conditions prescribed by the act of June 13, 1812. The words used by the law-makers are, in respect of all claims embraced in the reports of the recorder dated November 1, 1815, and February 2, 1816, that the claims, "where the decision of the commissioner is in favor of the claimants, shall be, and the same are hereby, confirmed, to wit, *confirmations of village claims under the act of Congress of the thirteenth day of June, 1812,*" * * etc. (sec. 2 of the act of April 29, 1816). It is scarcely necessary to note here that the

recorder of land titles at Missouri was commissioned by the act of June 13, 1812 (secs. 4 and 8), to make the inquiry the result of which these reports embodied, and in section 2, of the act of April 29, 1816, just quoted, in the same sentence, he is called by both names.

It is unnecessary to pursue the examination further, though it would be easy to show that, in every act subsequently passed by Congress, down to July 4, 1836, the same careful protection is thrown around the person who could claim the benefit of a prior act. This is demonstrably true, even of the act of May 26, 1824, where this protection is apparently omitted; but time would be taken up in illustrating this position, and in the case at bar we are only concerned with the operation of the acts of March 3, 1807, and April 29, 1816. Now, it is familiar to the bar of St. Louis that the reports of the recorder, referred to in section 2 of the act of April 29, 1816, in every instance of a recommendation of a claim to a "town or village lot, out-lot, or common-field lot," for confirmation, assigned as a reason therefor that it had been ascertained by the recorder to have been inhabited, cultivated, or possessed prior to December 20, 1803. The confirmation by the first section of the act of June 13, 1812, proceeded upon these facts existing in the past, and the further fact of a present existing claim in accordance with such possession, inhabitation, or cultivation. When, therefore, Congress, in 1816, declared the recommendations of the recorder in respect of "village claims," to be confirmed under the act of Congress of June 13, 1812, it established two things: First, that in respect of these claims the United States, which was the proprietor of the land, accepted the recorder's report as authentic, enduring, and conclusive evidence of the possession, inhabitation, or cultivation prior to December 20, 1803, of the land which was the subject of the village claim; and, second, of the right of a subsisting claimant thereto, who was either the first proprietor of the claim or some one representing him. The legal consequences of the establishment of these facts

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were declared also. The claimant was confirmed in his rights, and the persons whose claims were thus enumerated in the reports of the recorder enjoyed a marked advantage by reason of this authentic preservation and perpetuation of the evidence of this possession, inhabitation, and cultivation, etc., over those who were, for want of such support, compelled to resort, whenever their title was challenged, to the testimony of living witnesses, numerous in 1812, but of whom few indeed now survive to establish the fact of such possession, etc. But the confirmees under the act of 1816 were, in terms, confirmees under the act of 1812. The facts alluded to being established to the satisfaction of the proprietor of the whole territory, they received from the bounty of Congress such relief as was given by the act of June 13, 1812—that is, their claims were *ipso facto* confirmed, subject to the condition and qualifications stated in that act, the chief one of which was that the confirmee should take nothing by this confirmation *as against any other person whose claim to the same land had been confirmed by the board of commissioners, etc.* Now, Livette was confirmed as one of a class. The necessary, irresistible qualification of his confirmation was that his "village claim was confirmed so far as, and no further than, it lay outside of, and did not affect, the claim of Labeaume, or any other person confirmed by the board of commissioners, etc. His confirmation carried on its face its own limitation, and could never be set up against that of Labeaume, and, whatever may be thought of the possible validity of an unqualified grant by Congress, in 1816, of land within the bounds of a survey filed to identify and ascertain the land confirmed to some one else in 1810, but not conclusively adopted and ratified by the United States until 1851, no such validity can be claimed for a grant which expressly and industriously excepts from its operation all land which is within that survey.

It is of course unnecessary to dwell upon the meaning of the phrase "village claims." Its significance is indicated

by the context in the section where it occurs. The claims intended are such as are confirmed by the act of June 13, 1872, and by reference to that act we see that these are claims for "town or village lots, out-lots, common-field lots, and commons." We also know, historically, that the French or Spanish town or village embraced all these particulars—that all these were considered part of the French or Spanish village or town.

Before closing our remarks we are led, through the warning conveyed by the obstinate litigation into which parties have been led by an unguarded expression, to state what seems to us a necessary qualification of the rule we have laid down. If we thus protract this opinion to what seems an undue length, and exhibit a degree of caution which may be considered excessive, the fault is less serious than if we mislead the bar by stating, without qualification, a proposition, the limitations of which are, we think, not only important, but essential. A similar degree of caution in framing the rule found in 17 How. (*West* v. *Cochran*), might have prevented a wasting litigation, and its attendant loss of time and money.

The qualification we desire to note is that, while the several acts of Congress carefully guard any prior confirmee, not within the purview of the later act, from being affected by that later act, this, and no more, is the aim and object of the proviso. Congress, in the proviso to the act of 1812, seeks to protect—whom? Any person claiming the same land under the provisions of a former act, who is not within the beneficial operation of the later act. It would clearly be senseless and contradictory to refuse to A the benefit of a confirmation by the act of 1812, because he had already procured in his favor a report or decision of the board of commissioners, etc., for the same land. Such a decision, as we know, would not create a complete title (*Burgess* v. *Gray*, 16 How. 48) even if surveyed. Until surveyed, the claim confirmed would have no locality, and the confirmee no legal standing in court. *West* v. *Cochran*, 17 How. 412.

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But a confirmation by the act of 1812 conveyed a complete title without more. *Saxignac* v. *Garrison*, 18 How. 136; *Guitard* v. *Stoddard*, 16 How. 494. It would obviously be advantageous to A if, having a claim on which the board of commissioners had acted favorably, he should be confirmed in his claim to the same land by the act of June 13, 1812. Such operation of the act of 1812 would not, and could not, contravene the policy of Congress indicated in the proviso, but would directly promote it. Is there anything in the language employed which nevertheless leads to the conclusion that, perhaps without intending it, Congress withdrew all such cases from the operation of the act of 1812? If so, of course a court does not possess the power of correcting a legislative inadvertence; but we are of opinion that the contrary intention is clearly manifested.

We have seen that in the act of 1807 the words used are "affect or impair the rights," etc. This is what Congress was careful to avoid doing, and clearly nothing was forbidden by this act that did not tend to "affect or impair the rights," etc., of any prior claimant. If the necessary or accidental operation of the section to which this proviso was annexed were to *validate and strengthen* the rights of a prior claimant, no one, we think, would dream that such operation was hindered by the proviso.

But the signification of the word employed in the proviso of the act of 1812 is, we think, the same with that we have just considered. Undoubtedly a party may be beneficially affected, as well as injuriously affected, by anything, and the word *affect*, standing alone, may be said to be equivocal. But, besides that, all these acts (that of 1807, that of 1812, that of 1814, and that of 1816), being *in pari materia* (in fact, we should not overstate it if we said *in eâdem materiâ*), are to be construed together, and the same words occurring in each are to receive the same interpretation throughout. *Ailesbury* v. *Pattison*, Doug. 30; *Rex* v. *Loxdale*, 1 Burr. 445 (Lord Mansfield's decisions); *State* v. *Springfield Township*, 6 Ind. 83; *Board of Commissioners* v. *Cutler*,

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6 Ind. 354; *McCartee* v. *Orphan Asylum Society*, 9 Cow. 437. We see that such is, indeed, the conclusion to which we are compelled, in an instance where "affect" is found alone and unqualified; that we are forced to read it in the sense of "affect injuriously;" and that the intention of the law-makers was to guard the former confirmee, being a different person from the later confirmee, from a title that might otherwise be acquired by the later and different person to the *same* land.

We refer, for the purpose of this argument, to the second proviso to the first section of the act of April 12, 1814: "Provided, also, that no confirmation made by this section shall affect the rights of any person claiming the same lands, or any part thereof, whose claim has been confirmed by a board of commissioners for ascertaining and adjusting claims to land in said State or Territory, nor *preclude a judicial decision between private claimants in such interfering claims.*" Here only the word "affect" is used in the first clause of this second proviso; but its meaning is clearly the same as "impair," or "affect injuriously," for in the second clause it is declared that it is directed against "*such interfering claims*" as might otherwise, by possibility, prejudice the claim of the prior confirmee. The claim provided against is *ex vi termini* an "*interfering claim;*" that is, in order to come within the prohibition of the proviso, the person who, but for the proviso, might claim a confirmation under the later act, must be a different person to whom it would otherwise confirm an "interfering claim." This is the view of the matter which we understand the Supreme Court of the United States to take in the case of *Strother* v. *Lucas*, 12 Pet. 410 (p. 454, for the passage referred to), and we consider it unnecessary to say more.

All the judges concurring, the judgment of the Circuit Court is affirmed.

[NOTE.—This decision was rendered in May, 1876. At the October term, 1876, of the United States Supreme Court, a decision (*Ryan* et al. v. *Carter*, 3 Otto, 78), was rendered, sustaining the qualification made at p. 537 *et seq.*

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BART BRENNAN, Plaintiff in Error, *v.* JOHN H. TRACY, Defendant in Error.

June 26, 1876.

1. In an action for malicious prosecution, the issue is, not whether the plaintiff was guilty of the crime for which he was prosecuted, but whether the plaintiff had probable cause to believe him so. It is not error to refuse testimony offered to show the plaintiff's intent in committing the acts alleged against him.

2. The question of probable cause does not depend so much upon the real facts as upon the honest belief of the party prosecuting. Innocence of the suspected party is not necessarily inconsistent with an honest belief of his guilt.

3. The question whether a publication calculated to affect the value of the stock in a banking corporation, and so to operate upon its business reputation, is libelous or not, cannot be determined by an exmaination of the assets and liabilities of the corporation. The true test is to be found in the market value of the stock.

4. In an action for malicious prosecution, it is not error to reject proofs of the plaintiff's good reputation when his character has not been assailed in the trial.

5. Although the court may properly inform the jury whether certain facts do or do not constitute probable cause for a prosecution, yet an instruction offered which states the facts partially, omitting some which should be considered in connection with those stated, and declaring that the facts stated do not amount to probable cause, is properly refused.

6. In Missouri, libel is a criminal offense.

7. Where words, which on their face appear harmless, have a covert meaning, implying an injurious effect, the libel may be as complete as if it were apparent in the common acceptation of the words.

8. A corporation may be the subject of a criminal libel.

ERROR to St. Louis Circuit Court.

Affirmed.

Daniel Dillon, for plaintiff in error, cited: 2 Greenl. on Ev., secs. 454, 455; Stone *v.* Crocker, 24 Pick. 81; Humphries *v.* Parker, 52 Me. 505; 1 Bishop's Cr. Law, sec. 591; 2 Bishop's Cr. Law, secs. 907, 909, 918; The State *v.* Burham, 9 N. H. 34.

Farish & Griffin, for defendant in error, cited: Townsend, secs. 92, 263, 784 (2 ed.); 2 Stark. on Slander, 130;

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Gillett *v.* Missouri Valley R. R. Co., 55 Mo. 315; Maynard *v.* Fireman Ins. Co., 47 Cal. 207; 48 Ill. 87.

LEWIS, J., delivered the opinion of the court.

This is an action for malicious prosecution, originally instituted against the Central Savings Bank, Henry C. Patterson, and John H. Tracy. A demurrer filed by the Central Savings Bank was sustained, and the testimony failing to connect the defendant Patterson with the prosecution complained of, he was discharged of liability in this proceeding by an instruction, of which no complaint is made by the plaintiff in error. The points saved in the court below relate to defendant Tracy only, in whose favor a verdict was rendered by the jury.

It appears from the record that the plaintiff was owner of fifty shares of stock in the Central Savings Bank, at a time when the market value was about $42 per share; that he caused, nevertheless, an advertisement to be published in the daily papers of St. Louis offering his stock for sale at $30 per share; that, on the day when the advertisement appeared, several offers were made to plaintiff for the purchase of his stock at the price stated, but he refused to sell at less than $50 per share; that he sold it subsequently at the price of $40.

It further appears that, upon affidavit and information filed by defendant in the Court of Criminal Correction, plaintiff was arrested upon a charge of libel, on account of the advertisement above mentioned, and released upon bail for his appearance; that, after several continuances—the plaintiff having on each occasion appeared for trial—the cause was dismissed for want of prosecution.

Plaintiff complains that, in the trial of the present cause, he was not permitted to testify what was his intention in offering the stock for sale at $30 per share. He claims that, in order to constitute the offense of libel, there must be a malicious intent to defame and injure. This position may be correct; but the application fails. The matter of inquiry

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here was, not whether the plaintiff had in fact committed the offense of libel, but whether the defendant, in instituting the prosecution, had probable cause to believe that he had done so. His secret intentions, whether guilty or innocent, could form no part of the influences operating upon the belief of the defendant, and, therefore, had no relevancy to the question of probable cause. It may sometimes happen, as to particular facts necessary to constitute a criminal offense, that their non-existence will be the subject of legitimate proof in a case like the present. But this is because a knowledge of such non-existence may have reached the defendant, or may have been at least accessible to him, and so have negatived a reasonable ground for the prosecution complained of. The mere fact of intent in the accused party, known only to himself, and not made manifest by outward act, can never have any such operation. As was held in *Humphries* v. *Parker*, 52 Me. 505, the question of probable cause, in an action for malicious prosecution, does not always depend upon "the real and exact facts," but upon "the honest belief of the party prosecuting." Innocence of the suspected party is not necessarily inconsistent with such an honest belief of his accuser, nor does the former, so far as the illustration here proposed is concerned, tend in the least to disprove the latter. We cannot perceive that any harm was done to the plaintiff's case by the exclusion of which he complains. These considerations apply with like force to most of the points made by plaintiff upon the exclusion of testimony offered in his behalf.

The court refused to permit plaintiff to prove by the books of the bank, embodying an exhibit of its assets and liabilities, what the stock was actually worth at the time of his offer to sell. Here, again, the plaintiff was attempting to raise a false issue. The alleged libel, if it affected the stock of the bank at all, could reach it only through its market value. This was a matter, not of book-entries, but

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of financial credit. The bank was entitled to the full value of its reputation at the stock exchange, whether this was or was not justly founded on the state of its books. A bank's business success depends hardly less upon its credit than upon the money in its vaults. If the plaintiff's published offer to sell stock at a reduced price was libelous, by reason of injury maliciously done or intended against the credit of the corporation, the criminality of the act would remain, notwithstanding such credit might possibly also suffer detriment from an exposure of the internal management of the bank. We find no erroneous action of the Circuit Court in this connection. For the reasons already stated, and for others which should be yet more obvious, the court committed no error in excluding the testimony offered to show the value of the stock at the time of the trial. If the market value had then depreciated, this may have resulted, in whole or in part, from the plaintiff's publication.

There was no error in the refusal of plaintiff's offer to prove a previous good reputation. As this was not assailed, a well-known legal presumption established it without proof.

Plaintiff complains of the refusal to give an instruction asked by him, declaring that certain facts therein set forth, if they were all that had come to defendant's knowledge when he caused the plaintiff's arrest, were not sufficient to constitute the probable cause for the process of action. It is true, as claimed, that the court may properly declare whether certain facts, if proved, will or will not constitute probable cause for a criminal prosecution. But, apart from this, the instruction offered was refused upon grounds manifestly sufficient. It ignored many particulars in the proofs which the jury could not disregard. It made no allusion to the market value of the stock at the time of the publication, or to the plaintiff's knowledge thereof. It omitted other important facts proved, which might have gone far to create

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a reasonable belief in defendant that the plaintiff was guilty of a libelous publication. Whether the instruction as framed was true or not in the abstract, its necessary tendency, if given, would have been to mislead the jury into a disregard of some of the most important features in the controversy.

Several instructions were asked for, and refused, to the effect that the publication made by plaintiff was not a criminal offense in Missouri. That libel was an indictable offense at common law, and, as such, is embodied in the criminal law of this State, is too generally understood to need discussion here. But was it libelous for the plaintiff to advertise his stock for sale on any terms which he might choose to offer? "Words which on their face appear to be entirely harmless, may, under certain circumstances, convey a covert meaning, wholly different from the ordinary and natural interpretation usually put upon them." If, in such covert meaning, an injurious effect is implied, the offense of libel is as complete as if it were apparent in the common acceptation of the words employed. *Maynard* v. *Fireman Ins. Co.*, 47 Cal. 207. The question of injurious effect must be determined by the peculiar circumstances of each case. It is easy enough to discover a strong probability, at least, of injurious effects in a public offer to sell the stock of a banking corporation at a price greatly below its supposed current value. For the purposes of the present case, we have only probabilities to deal with. It was sufficient for the defense to show, as to any element of the crime of libel, that there was a reasonable probability of its existence.

It seems to be argued for the plaintiff, however, that there cannot be a criminal libel against a corporation, because the criminality, if any, lies wholly in the tendency to cause a breach of the peace, and a corporation cannot commit such a breach, or be provoked thereto. But, the premises here being false, the conclusion fails. It is by no

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means essential to the indictable character of a libelous publication that it tend to provoke the commission of assault and battery by the party injured. It is sufficient if the general tendency, either with or without reference to the party directly affected, be "to provoke animosity and violence, and to disturb the peace of society." *Rex* v. *Darby*, 3 Mod. Rep. 139. Whatever may be the soulless condition of the corporation, its individual members may not be destitute of interest in its good fame, nor yet incapable of personal resentment.

The instructions given by the court for both parties, and of its own motion, were numerous and full—giving to the jury a clear and correct exposition of the law governing the case. We can find no substantial error in any of the proceedings. The judgment, therefore, is affirmed. Judge GANTT concurs; Judge BAKEWELL not sitting.

MARKET STREET BANK, Respondent, *v.* WILLIAM A. STUMPE *et al.*, Appellants.

June 26, 1876.

1. Where a party, though not served, appears on the trial, is voluntarily examined as a witness in his own behalf, and submits himself to the jurisdiction of the court, he is bound by the judgment against him in the cause.
2. The mere fact that the directors of a bank knew of, and sanctioned, overdrafts, will not release from liability the sureties of a teller who causes a loss to the bank by permitting overdrafts.
3. The directors of a bank have no power to sanction overdrafts.

APPEAL from St. Louis Circuit Court.

Affirmed.

E. W. Pattison and *Davis & Smith*, for appellants, cited: Union Saving Assn. *v.* Edwards, 47 Mo. 445; Covenant Mutual Life Ins. Co. *v.* Clover, 36 Mo. 392; Ingraham *v.* Maine Bank, 13 Mass. 208; Cook *v.* The State, 13 Ind. 154;

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Moss *v.* The State, 10 Mo. 338, and cases cited; Kitson *v.* Julian, 82 E. C. L. (4 El. & Bl.) 853; Bigelow *v.* Bridge, 8 Mass. 275; Fell on Guard. and Sur. 126; also p. 129, note 1; Amherst Bank *v.* Root, 2 Metc. 540; Kingston Mutual Ins. Co. *v.* Clark, 33 Barb. 201, and cases cited in note *a*, p. 504 of Fell on Guard. and Sur. (3d. ed.); Wag. Stat. 330, sec. 3; Lexington, etc., R. R. Co. *v.* Elwell, 8 Allen, 371; Chelesford *v.* Demarest, 7 Gray, 1; State Treasurer *v.* Mann, 34 Vt. 376.

A. R. Taylor, for respondent, cited: Orear *v.* Clough, 52 Mo. 57; Lewis *v.* Nichols, 26 Mo. 279; Peters *v.* St. Louis & Iron Mountain R. R. Co., 59 Mo. 406; Feedler *v.* Schroeder, 59 Mo. 564; Scott *v.* Niles, 40 Vt. 574; 4 Greene (Iowa), 439, 442; Craig *v.* Barber, 1 Col. 172; 5 Ark. 518; Roberts *v.* Townhall, 46 Ill. 66; 29 Wis. 669, 419; 48 Barb. 132; 42 Ala. 491; 4 Denio, 245; Mackey *v.* Underwood, 47 Mo. 182; Morse on Bank. 316.

BAKEWELL, J., delivered the opinion of the court.

This is an action against the cashier of plaintiff and the sureties on his bond.

The petition alleges that, on February 20, 1872, defendant Stumpe was appointed cashier and teller of plaintiff for the period of one year, and was, on January 14, 1873, reappointed for one year; that, on February 20, 1872, Stumpe as principal, and the other defendants as sureties, executed a bond to plaintiff for $25,000, conditioned that, whereas Stumpe was duly appointed cashier of plaintiff, and may from time to time be continued and reappointed cashier and teller of plaintiff; now, if he shall, during all the time that he shall hold such office of cashier and teller, or act as such, whether under the present appointment or future reappointment, faithfully account for and pay over all moneys, and faithfully perform all his duties as cashier and teller, then the obligation to be void; otherwise, to remain in force. The breach of the bond assigned is that, between January 30, 1873, and April 27, 1873, he paid out

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to one Thompson, on his check, $6,804.43 over the amount deposited by Thompson, which was wholly lost to the bank; and, also, that he converted to his own use $4,716.82 of the money of plaintiff.

Defendant Stumpe was not served. The other defendants answer, admitting the appointment of Stumpe, as alleged, on February 20, 1872, for one year; they deny any knowledge of his reappointment on January 14, 1873; they also deny all breaches of the bond.

The cause was, by consent, referred to a referee, who in due time filed his report, by which it appears that the referee finds from the pleadings and evidence that plaintiff is a corporation, as alleged; that defendant Stumpe was appointed cashier and teller of plaintiff on February 22, 1872, and reappointed January 14, 1873, and served in that capacity from February 22, 1872, to June 9, 1873, inclusive; that the bond sued on was executed by defendants, and that, whilst cashier and teller of plaintiff, defendant Stumpe paid out to one Thompson, from money of the bank in his possession as cashier, on the checks of Thompson, over and above his moneys on deposit, $6,804.43.

The referee finds further that this was a breach of the bond, and that defendants are liable, on the first count of the petition, in the sum of $7,167.63.

The referee further finds that, during the period aforesaid, and whilst cashier of plaintiff, Stumpe received several sums of money, amounting altogether to $4,716.80, belonging to plaintiff, which he converted to his own use; that this was also a breach of the bond, and that plaintiff is entitled to recover of defendants, for the second count, $4,968.82.

Exceptions were filed to the report of the referee, which were overruled, and judgment was entered for plaintiff against all the defendants. A motion for a new trial having been overruled, the cause is brought here by appeal.

1. The first objection urged here by appellant is that the

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judgment is erroneous in this: that it is entered against all the defendants, but that the court had no jurisdiction of Stumpe, as he was not served.

If the judgment is void as to Stumpe, it must be set aside as to all the defendants.

But it is a valid judgment against Stumpe, who was not served, but who, as appears by the record, appeared and subjected himself to the jurisdiction of the court. The record says that the defendants—that is, all the defendants—by their attorneys, appeared and asked leave to file an amended answer; that defendants, by their attorneys, agreed to a reference, and waived notice. The referee recites that the parties appeared before him, and the trial began. Stumpe was sworn as a witness, and examined on behalf of himself and his co-defendants, and states that he has, in his testimony, covered all the ground he intended to cover. The first statement made by Stumpe as a witness in his own behalf is, "I am one of the defendants."

Nor does he now appeal, or allege that the judgment is not good against him.

When a party to the suit is present and participates in the trial, it is a waiver of service. In this case the record, in many instances, shows that counsel appeared for all parties, and that all parties were present by themselves or counsel during the whole trial of the cause.

2. We are next told that the sureties were not liable for the overdraft of Thompson, for the reason that overdrafts were allowed and sanctioned by the board of directors.

The fact—and it appears to be a fact—that the board of directors, or some of them, knew that from time to time one or another depositor was allowed to overdraw his account, is by no means a justification of the act of the teller in allowing a man, whom he must have suspected to be in straitened circumstances, to overdraw his account nearly $7,000. There was evidence given by Stumpe, the defaulting teller himself, that the board, in 1872, talked

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about overdrafts, at a regular meeting, and said that they ought not to be allowed, though sometimes they could not be avoided. There is also evidence that depositors did constantly overdraw, and that amongst those thus overdrawing were the president and some of the directors of the bank.

It is held that directors of a bank have no power to allow overdrafts, and that the fact that they sanction them does not relieve the cashier or his sureties. The rule is a most wholesome one; it is well supported by authority, and, so far as we know, has not been departed from in this State. *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46. An overdraft is a loan, and the cashier of a bank has no right to loan the money of a bank at will, and without the usual precautions and formalities. We are referred to *Union Savings Association* v. *Edwards*, 47 Mo. 445, and told that a different rule is adopted in that case, and that the Supreme Court of our State, in that case, indicates its opinion that such permission or sanction of overdrafts by the directors will discharge the sureties of the cashier. But there is no such point in that case. Edwards, as is said in the opinion of the court, acted contrary to the express instructions of his superiors. It is true that the Circuit Court, in that case, gave an instruction to the effect that, if the jury believe from the evidence that Edwards, with the knowledge of the president and directors of plaintiff, was in the habit of paying overdrafts made by depositors, and acted, in the particular instance at bar, in good faith, and in accordance with his best judgment, in paying the overdraft, then plaintiff cannot recover, unless it satisfies the jury, by evidence, that Edwards was prohibited from paying this particular overdraft. But, as this instruction could not possibly prejudice defendants in that case, it was not necessary to pass upon it; and the court, in saying, as it does, that the declarations of law present the whole case with such fairness that it was impossible for defendant to find

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any ground of complaint, is not necessarily negativing the idea that the instructions for defendant were really more favorable for defendants than they had any right to ask. Be that as it may, we do not understand that it is ruled in this State that the fact that the president and directors of a bank overdraw their accounts, and know that certain customers overdraw, will discharge the sureties of the cashier in a case such as the one before us. From such examination as we have given to this very voluminous record (in the examination of which we have not been assisted by the brief of counsel for defendant, who do not think it worth while to refer to the pages of the record for confirmation of their statements as to testimony), we are satisfied that the facts fully justify the finding of the referee, as to the liability of the sureties of Stumpe for the overdraft of Thompson.

3. Lastly, we are told that, at the time of the embezzlement of the funds of the bank by Stumpe, he was no longer cashier. The latest date fixed for this conversion of the money is June 9th. During the whole of that day he was acting as teller, by virtue of a former appointment, and was then actually cashier and teller of plaintiff, as the referee finds.

The resolution accepting his resignation, accepts it to take effect on June 10th, and up to that day he alone acted as cashier of plaintiff.

We think the evidence supports the finding of the referee on this point. If there is any evidence to support the verdict of a jury, or the finding of a referee, the appellate court will not look into its weight.

We see no reason whatever for disturbing the judgment in this cause, and, with the concurrence of all the judges, it is affirmed.

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JOHN S. CAVENDER *et al.*, Respondents, *v.* WILLIAM WADDINGHAM, Appellant.

June 26, 1876.

1. When one negotiates through a real estate broker for the purchase of a lot, the transaction, if completed, includes two contracts: one made with the vendor, and another with the broker for his compensation. A suit by the broker is not an attempt to enforce a contract made by defendant with a third party.
2. W. employed C. & R. to purchase a lot for him upon certain terms, stipulating that the compensation of the latter was to be deducted from the purchase money going to the vendor, and was in no event to be paid by W. *Held*, that W. would be liable, nevertheless, to C. & R. for their proper fees, in case of a violation of the contract by W. in refusing to take the property.
3. Where, at the time of making an alleged contract, one of the parties was, by reason of the excessive use of intoxicating liquors, "in such unsound mental condition that he was wholly void of judgment and discretion," no contract, in contemplation of law, was in fact made, and evidence to that effect is admissible under the general issue.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

Hill & Bowman, for appellant, cited: Brown on Stat. Fr. (ed. 1873), sec. 511, pp. 391, 402, 411, 414; Hook *v.* Turner, 22 Mo. 333; Wag. Stat. 1015, 1033, 1034, sec. 8, p. 1040, sec. 15; Martin *v.* Martin's Admr., 27 Mo. 227; Irwin *v.* Childs, 28 Mo. 576; Thompson *v.* Mosley, 29 Mo. 477; Alterbery *v.* Powell, 29 Mo. 429; Green *v.* Gallager, 35 Mo. 226; Archer *v.* Merchants & Manufacturers' Ins. Co., 43 Mo. 442; Ward *v.* Pine, 50 Mo. 38; Barry *v.* Coombe, 1 Pet. 640; Kay *v.* Curd, 6 B. Mon. 103; 1 Sugden on Vend. (3d Am. ed.) 258, 259; *Ib.* 259, sec. 8 and notes, p. 260, note *t;* King's Admr. *v.* Wood, 7 Mo. 390; Sugden on Vend. (ed. 1873) 198, 199, note 2, p. 251, sec. 218; Hazard *v.* Day, 14 Allen, 494; Gaunt *v.* Hill, 1 Stark. 10; Ballingall *v.* Bradley, 16 Ill. 373; Stratford *v.* Bosworth, 2 V. & B. 341; Whaley *v.* Bagnell, 1 Bro. P. C. 345;

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Roberts *v.* Tucker, 3 Wels. Hurl. & Gord. 632; Browne on Stat. Fr. (3d ed.) 391, sec. 371; Smith *v.* Surnam, 9 B. & C. 561; Williams *v.* Bacon, 2 Gray, 387; Jenness *v.* Mt. Hope Co., 53 Me. 20; Benj. on Sales (Perkins' Am. ed.), 39, note *c*, 40, sec. 39; Thomas *v.* Blackman, 1 Col. 301, 312; Chevely *v.* Fuller, 13 C. B. 122; Lyman *v.* Robinson, 14 Allen, 242; Hutcheson *v.* Blackman, 3 Metc. (Ky.) 80; Carr *v.* Duval, 14 Pet. 77; Bruce *v.* Bishop, 43 Vt. 161–163; Eliason *v.* Henshaw, 4 Wheat. 225–228; Abbot *v.* Sheppard, 48 N. H. 16; Thurston *v.* Thornton, 1 Cush. 89; Allcot *v.* Boston Steam Flour Mill, 9 Cush. 17; Potts *v.* Whitehead, 5 C. E. Green, 55–58; *Ib.* 512; Schreck *v.* Pierce, 3 Iowa, 350.

James O. Broadhead, and *Broadhead & Overall*, for respondents, cited: Ferguson *v.* Hannibal & St. Jo. R. R. Co., 35 Mo. 452; Caldwell *v.* McKee, 8 Mo. 339; Pinkston *v.* Stone, 3 Mo. 119; Powers *v.* Nelson, 19 Mo. 190; Ponroz's Admr. *v.* Brown, 19 Mo. 302; Irwin *et al.* *v.* Chiles, 28 Mo. 576; Wag. Stat. 1015, sec. 12; Green *v.* Gallagher, 35 Mo. 226; Northrup *et al.* *v.* Mississippi Valley Ins. Co., 47 Mo. 435; The State *v.* Williams, 48 Mo. 210; Hazin *v.* Cliff, 10 Baldw. 303; Beatty *v.* Swarthout, 32 Barb. 293; Weaver *v.* Barden, 49 N. Y. 284; Webb *v.* Counce, 11 Mo. 9; Moses *v.* Burding, 31 N. Y. 462; McGavock *v.* Woodlief, 20 How. 221; Koch *v.* Emmerling, 22 How. 69; Barnard *v.* Monnot, 15 Am. Law. Reg. (N. S.) 209; Coleman *v.* Carrigan, 18 Barb. 67; Glentworth *v.* Luther, 21 Barb. 145; Holly *v.* Gosling, 3 E. D. Smith, 262; Chilton *v.* Butler, 1 E. D. Smith, 150; Beebe *v.* Roberts, 3 E. D. Smith, 194; Doty *v.* Miller, 43 Barb. 529; Story on Ag., secs. 29, 107; Riley *v.* Minor, 29 Mo. 459.

Arba N. Crane, for respondents, cited: Broadwater *v.* Darne, 10 Mo. 277, 286; Eaton *v.* Perry, 29 Mo. 96; Harrison *v.* Richardson, 1 Moo. & R. 504; Greene *v.* Gallagher, 35 Mo. 226; Bailey *v.* Chapman, 41 Mo. 536; 2 Wag. Stat. 1037, sec. 23.

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LEWIS, J., delivered the opinion of the court.

The petition states that plaintiffs, under the partnership style of Cavender & Rowse, are real estate agents and brokers. That, on February 28, 1874, defendant employed them to purchase for him from Messrs. John A. and William H. Scudder "a lot of ground in blocks numbered 23 and 24 in the city of St. Louis, fronting one hundred and eighty-three feet and five inches on Main street, by a depth of one hundred and forty-two feet and three inches, being the same lot whereon the Ames pork-house is situated;" that defendant instructed plaintiffs to offer $600 per foot for the property, and to effect the purchase at that price within ten days; that it was understood that plaintiffs' commissions on the transaction would be 2 1-2 per cent. of the purchase money, but it was stipulated that this should be paid by the Messrs. Scudder, and that plaintiffs would divide the same, when realized, with the defendant, allowing him one-fifth part thereof; that, on March 2d following, plaintiffs consummated the agreement for the purchase in exact accordance with defendant's directions; that the Messrs. Scudder, complying with the proposed terms, duly executed and acknowledged a general warranty deed of the property to defendant, and delivered the same to plaintiffs, authorizing them to receive the purchase money from defendant, and to retain out of it their commission of 2 1-2 per cent; that plaintiffs, on March 9th, offered the deed to defendant, but he refused to accept the same, or in any manner to ratify or complete the said judgment; that plaintiffs thus lost their commissions earned in the negotiation of the purchase, whereby they are damaged in the sum of $4,000, for which they ask judgment. Defendant's answer denies all the allegations in the petition.

The cause was tried before a jury, who rendered a verdict in plaintiffs' favor for $2,314.65. Defendant appealed.

The first question to which our attention is directed is whether, upon the facts stated, the plaintiffs had any right

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of action against the defendant? It is argued that they had none, because it was expressly stipulated that their commissions were be to paid by the Messrs. Scudder, and not, in any event, by the defendant; that this is an attempt to hold a party responsible for violating his contract, not with the party suing, but with a third party—the defendant here having violated none except that made through the plaintiffs, Messrs. Scudder. But this argument ignores the prominent fact that there were two distinct contracts. One was made by defendant, through his agents, in the purchase of the property. The other was made with the agents, in securing their services to bring about the purchase. The latter is the subject of the present suit.

When the plaintiffs were employed by the defendant to effect a purchase for his benefit, they undertook to do so for a consideration, which was clearly understood. This was that, in the event of success, they were to be compensated according to the usages of their business, by a per centage upon the amount of purchase money. The defendant said to them, in effect: "You procure the consent of the property owners to sell to me upon the terms indicated. I undertake, on my part, to consummate the trade by paying the purchase money, so that you will realize your commissions." The defendant's undertaking to take and pay for the property, so that plaintiffs would get their compensation, was as emphatic and as binding as if he had agreed to pay the commissions himself. Can he deliberately violate that obligation, and then set up his own dereliction as a reason why the other contracting parties shall lose their earnings? It is here urged that, in "no event, was the defendant to pay the commissions." But that was a condition of the contract, and, like all other conditions, was based on an assumption that the terms of the contract would be performed. When the defendant failed on his part, the whole was annulled. The plaintiffs then sue him for the commissions, or their equivalent, not because the contract holds him to their payment, but because, by his violation of the

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contract, he has destroyed its obligatory force, and deprived the plaintiffs of the fruits of performance on their part; wherefore they are entitled to such a recovery in damages as will restore what the defendant has unlawfully compelled them to lose through his non-performance. The defendant can hardly say to the plaintiffs, "I have violated my contract; therefore, I hold you to its exact terms." It is very clear, in our view, that the petition shows a complete cause of action.

The testimony tended generally to prove the plaintiffs' case as set out in the petition. Defendant offered to prove that, at the time of his alleged employment of the plaintiffs to make the purchase, he was in a state of mental incapacity from the use of intoxicating liquors. On plaintiffs' objection the testimony was excluded. The court afterwards refused to instruct the jury, on defendant's application, that, if "the defendant was, by reason of the excessive use of spirituous liquors, at the time of the making of the alleged contract, in such unsound mental condition that he was wholly void of judgment and discretion," then the verdict should be for the defendant. These rulings appear to have been because the defense of mental incapacity to make the contract was not specially pleaded. They are upheld by counsel for the plaintiffs on the ground that such a defense was new matter, and, therefore, could not be introduced under a general denial of the plaintiffs' allegations.

While it is true that many defenses which might formerly have been proved under the general issue are now excluded by our practice act, unless specifically alleged as new matter, yet it does not appear from the views held by our Supreme Court that this can possibly be one of them. In *Corby* v. *Weddle*, 57 Mo. 452, defendant denied the execution of the note sued on, and, under that plea, introduced proof that his signature was obtained by fraudulent means. This was held proper by analogy with the general rule that, "when a deed is void *ab initio*, and not merely voidable, the plea

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or *non est factum* is proper; and the facts showing the instrument to be void may be given in evidence to sustain such plea." No reason appears why the rule should not equally apply to parol contracts. In *The State* v. *Williams*, 48 Mo. 210, it was held that "an answer setting up new matter by way of defense should confess and avoid the plaintiff's cause of action." In the case before us the defense, if it amounted to anything, was that the defendant's contract was, by reason of his mental incapacity, absolutely void; which is simply saying in effect that, as a contract, it never had any existence, or was never made by him. There would be a manifest incongruity in averring that the defendant had made the contract as charged, but that the same, *ab initio*, was absolutely void. Yet this must be done if the defense be really new matter, and, therefore, admissible only in confession and avoidance. When at common law such a defense was permitted under the general issue, this was not by virtue of any specious reasoning or unexplained liberality, but because it was considered to be literally within the denial of execution. Said Lord Ellenborough, in *Pitt* v. *Smith*, 3 Camp. 33: "You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed the paper. He had not an agreeing mind." We think that a denial in general terms of the making of a contract puts in issue every fact essential to the original creation of the obligation. Such seems to be the doctrine of the leading authorities, and with it we cannot reconcile the action of the Circuit Court in the present case. For this error the judgment must be reversed and the cause remanded.

Complaint is made by defendant that the court refused permission to amend his answer, during the trial, so as to introduce the proper allegations of intoxication, etc., by

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way of special defense, or new matter. We need not consider this question, since, from the views already given, it appears that the amendment was unnecessary. Many other points in the case have been exhaustively discussed by counsel. But, in their treatment by the Circuit Court, we find nothing to suggest that any comment here would contribute new assurances of a fair trial upon the next hearing.

All the judges concur.

DAVID H. SILVER *et al.*, Respondents, *v.* ROBERT S. HALE, Appellant.

June 26, 1876.

1. **Where goods are to be transported by water, and, owing to the stage of the river, cannot be taken by water to their destination, the carrier is not bound to forward them overland; and, if there has been no want of diligence, is not answerable for delay if the goods finally arrive safely.**
2. **Evidence that no boats arrived at the point of destination of the goods during the season is competent, as tending to show that the default was not occasioned by the negligence of the carrier.**
3. **The time granted for argument is a matter within the discretion of the trial court; and this court will not interfere unless it is clear that that discretion has been abused.**

APPEAL from St. Louis Circuit Court.

Affirmed.

Davis, Thoroughman & Warren, for appellant.

Slayback & Haeussler, for respondents, cited: Steamboat Missouri *v.* Webb, 9 Mo. 193; Weatherford *v.* Farrar, 18 Mo. 474; Parsons *v.* Hardy *et al.*, 14 Wend. 215–218; Landes *v.* Pacific R. R. Co., 50 Mo. 346; Carpentere *v.* Rynders, 52 Mo. 281; Bailey *v.* Chapman, 41 Mo. 536; 21 Barb. 145; United States *v.* Stewart, 2 Biss. 412; Renford *v.* Smith, 52 N. H. 355; Collier *v.* Swinney, 16 Mo. 484–490; Conkey *v.* Milwaukee, etc., R. R. Co., Am. Law Reg. (1873) 365; Solomon *v.* United States, 19 Wall. 17;

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Randall *v.* Kelsey, 46 Vt. 158; Gordon *v.* Lytle, 8 S. & R. 533; Mathews *v.* Coalter, 9 Mo. 705; Smith's Ld. Cas. 414; Conger *v.* Hudson River R. R. Co., 6 Duer, 375; Black *v.* Woodey, 39 Md. 194.

BAKEWELL, J., delivered the opinion of the court.

The plaintiffs allege in their petition that they are owners of the steamer "Tempest," and that, about April 4, 1869, defendant agreed with plaintiffs to ship on their boat, at St. Louis, to be transported to Fort Benton, at the rate of 4 1-2 cents per pound, about 49,000 pounds of freight; that accordingly the agents of defendant at St. Louis sent aboard the "Tempest," at that point, 48,653 pounds of freight, to be transported according to the terms of said contract; that the bills of lading were sent down to the boat with the freight, by the agents of defendant, to be signed by the agent of plaintiffs in triplicate, and contained the name "Helena, Mont. Ter.," instead of Fort Benton, as the point of destination of said goods; that the agent of plaintiffs corrected two copies of said bill of lading by erasing "Helena" and inserting "Fort Benton," but, in the hurry of business, neglected to make the proper change in the third copy, retained by defendant; that plaintiffs have fulfilled all the conditions of the contract on their part, and that defendant received and accepted said goods at Muscle Shell and Cow Island, and refused to pay plaintiffs the freight earned by them by carrying said goods. Plaintiffs ask that said bill of lading be reformed in accordance with the true intent of the parties, and for judgment of $2,189.38 freight earned by plaintiff under said agreement.

Defendant, in his answer, denies that there was any mistake in the bill of lading, and says the goods were, by contract, to be carried to Helena, and not to Fort Benton; that the goods were purchased by him of Richardson & Co., in St. Louis, and by Richardson & Co. shipped on plaintiffs' boat, to be delivered to defendant at Helena, Montana Territory; that plaintiffs did not deliver the goods at their des-

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tination, but at inaccessible way-points on the Missouri river, whence defendant had to transfer them to Helena, at a cost of $2,000. He also alleges that $500 of said goods were lost on the way, by the negligence of plaintiffs and neglect of their duty as common carriers; and also that, by reason of delay in carrying said goods, they depreciated in value $2,000, and asks judgment against plaintiffs for $4,500.

The replication denies the new matter in the answer.

The evidence tends to show that defendant agreed with plaintiffs to ship on their boat the goods mentioned in the petition, at 4 1-2 cents per pound, from St. Louis to Fort Benton; that Fort Benton is the highest point on the Missouri river reached by steamboats, and the regular landing for Helena, which is 150 miles inland, and reached from that point by wagons; that "Helena" was inserted in the bills of lading sent down to the boat by Richardson & Co., from whom defendant purchased the goods; that the bill of lading was in triplicate, and the words "Fort Benton" were, at the time, substituted for "Helena" on two copies of the bill of lading, but that, by oversight, this was omitted on the third copy, retained by Richardson & Co.; that the "Tempest" left St. Louis on April 7, 1869, for Fort Benton, with about 400 tons of freight; that she was obliged, by low water, to put off 175 tons of freight at Muscle Shell, about 325 miles below Fort Benton, and the rest of her freight at Cow Island, about 160 miles below Fort Benton; that she reached Cow Island about eighty days after leaving St. Louis; that this was a long trip, and that the distance from St. Louis to Fort Benton, about 3,100 miles, with good luck, is made often in fifty-five days. An effort was made to show that some delay was occasioned by mismanagement on the part of the captain of the "Tempest," but this was not shown. It was utterly impossible, when the "Tempest" reached that point, to get beyond Cow Island, the boat drawing twenty-four inches,

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and there being only twelve inches of water, with a rocky bottom; though Fort Benton could have been reached had the boat arrived a few days earlier. The owners of the boat did the best that could be done under the circumstances. An experienced captain was sent up from St. Louis by railroad, as soon as the news that the boat was stopped at Muscle Shell was received by telegram. The goods were left at Muscle Shell as to a part of them, and the remainder at Cow Island. These points were places of safety, protected from the Indians, being stockade forts, and having proper store-houses to receive the goods. Every effort seems to have been made to procure overland transportation to Fort Benton, but, owing to danger from hostile Indians, the goods could only be sent at the risk of the forwarder, and, after negotiating in vain for some means of transportation which would be reasonably safe, they were of necessity left at these two river posts, to await the opening of navigation in the spring. Afterwards, but at what time does not appear, defendant came on from Helena and transported his goods from Cow Island and Muscle Shell overland. What the cost of this transportation was, what was the depreciation in value in the goods consequent upon this delay, are matters that do not appear from the evidence. Some of the goods seem to have been lost or wasted before arriving at Cow Island, or at that point; the exact amount of this loss does not appear, but it is not claimed to exceed $500.

The jury found damages for plaintiffs $1,725.44, and found for defendant, on his counter-claim, $500, and rendered a verdict for plaintiffs for $1,252.44.

Defendant moved for a new trial, and brings this cause here by appeal.

The instructions given are very lengthy, and we do not conceive it necessary to set them out in this opinion. Certain instructions asked by defendant were refused; we shall not set them out at length.

1. It is claimed by defendant that, if navigation had become

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impossible, it was the duty of plaintiffs to forward these goods by land at least to Fort Benton, if that was practicable; and that it was practicable is shown, he claims, by the fact that he got them through himself. And the court erred, we are told, in refusing to instruct that plaintiffs, having failed to fulfill their contract, were liable to defendant for any depreciation in the value of the goods caused by the delay, and for any outlay to which he was put in their transportation.

That it was possible to transmit the goods to Fort Benton, and even to Helena, by land, is quite clear, because it was done by defendant, but the evidence in the case shows that the risk of total loss by hostile Indians was very great; that no carriers could be got, with the utmost exertion on the part of the plaintiffs, who would take the goods, except at exorbitant prices, and at the risk of the shipper. The plaintiffs deposited the goods in safe and proper custody, at the highest accessible point on their route, to await the re-opening of navigation. We think that the evidence shows that they did all they could, all that could be done, and that they adopted the safe and prudent course. We think that they were clearly entitled to *pro rata* compensation, unless the delay was caused by culpable negligence before reaching Muscle Shell, and, that question having been fairly submitted to the jury by the instructions, the jury found that there was no culpable delay before reaching the point of low water.

Where goods are to be transported by water, and a delay is occasioned by ice, it has been held that the carrier is neither liable to damages for account of delay, nor can he be compelled to forward the goods by land. Unless there has been a want of due diligence, no action for damages will lie in such a case if the goods finally arrive safely. *Pasrons* v. *Hardy*, 14 Wend. 215; *Hand* v. *Baines*, 4 Wheat. 204.

In the case at bar, the carrier was anxious to forward the

goods by land, and used extraordinary exertions to procure a conveyance, but could find none that was reasonably safe. He was not justified in running great risk of loss of the goods. If the owner chose to step in, take the goods from the place where they were arrested by a chance of navigation, and risk carrying them through hostile Indians, the fact that he had the good luck to get safely through does not alter the fact that he ran a great risk—a risk which he could lawfully take with his own property, but which no one else was bound to assume.

2. The court, against the objection of defendant, permitted evidence to go to the jury to the effect that no boat got through to Fort Benton during the season of 1869. We think such evidence was competent, as tending to show that the failure to reach Fort Benton was not caused by the negligence of the officers of the "Tempest." They could not be expected to do what no boat succeeded in doing. At any rate, the testimony did not prejudice defendant, since the only witness examined as to this point testified that there was no delay in reaching Cow Island, caused by any misconduct of any officers of the boat.

3. We are asked to reverse the case on the ground that the court refused to allow counsel more than ten minutes on each side to argue the case to the jury. This is a matter within the discretion of the court, and we cannot interfere unless it is clear that that discretion has been abused. We cannot say that there is anything to complain of in this action of the court. It would seem, indeed, that, as the close to the jury was with the other side, respondent was more likely to suffer from this ruling than appellant. But, though the case occupied the court for three days, and the evidence as preserved in the record is voluminous, few witnesses were examined, and there could not be much question about the facts. We do not think that it was a case which called for lengthy argument, and we shall not reverse the judgment on this ground.

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We have carefully read the whole record, and we cannot see that any substantial error was committed calculated to prejudice the rights of defendant. The verdict and judgment were for the right party, and the verdict was not excessive. The judgment of the circuit court is affirmed. All the judges concur.

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ROBERT KNECHT, Administrator of C. H. ROEDEL, deceased, Appellant, v. THE UNITED STATES SAVINGS INSTITUTION, Respondent.

June 26, 1876.

1. The relation existing between a bank and its depositor on current account is that of debtor and creditor. Accordingly, where a bank held a note against a depositor at the time of his death, which was larger in amount than the sum on deposit, the bank might present its claim in the Probate Court and have a balance struck between the two demands. The allowance thus entered is *res adjudicata*, and is conclusive against an action by the administrator to recover the money on deposit.
2. The credit entered by the bank, of the sum deposited, on its demand against the estate was not a voluntary credit, but was compulsory, under the statutory oath of the claimant.

APPEAL from St. Louis Circuit Court.

Affirmed.

Gottschalk, for appellant.

Slayback & Haeussler, for respondent, cited: Wag. Stat. 103, sec. 11; Wag. Stat. 104, sec. 22.

LEWIS, J., delivered the opinion of the court.

Plaintiff's intestate was a depositor on current account with the defendant, a banking institution. At the time of his death there stood to his credit the sum of $1,177.70, while the bank held a draft, not yet matured, for $4,000, which he would be liable to pay when due. Plaintiff, as administrator, demanded the balance of the deposit, which defendant refused to pay. When the deposit became payable, defendant presented in the Probate Court, for allow-

ance against the estate, its account current, including the amount of the draft, and giving credit for the deposit balance, whereby a balance appeared in defendant's favor of $2,825.55, which was allowed and classified in due form. Afterwards this suit was instituted by the plaintiff, administrator, to recover the intestate's deposit balance, notwithstanding the proceedings in the Probate Court. The cause was heard without a jury, and judgment rendered for the defendant.

The plaintiff appears to have fallen into the common error of supposing that, in bank deposits on current account, the bank is a mere custodian, agent, or trustee of the depositor. If such were the relation between the parties, there might have been some ground for the present action. The attempt has often been made, both in England and America, to attach that relation to such cases, but has always failed. The whole current of authority, without any considerable dissent, is to the effect that the ordinary relation existing between a bank and its current depositor is simply that of debtor and creditor. "The original and every subsequent deposit by the customer is, in strict legal effect, a loan by the customer to the bank, and, *e converso*, every payment by the bank to, or on account of, the customer is a repayment of the loans, *pro tanto*." This doctrine is forcibly illustrated in *Com. Bank* v. *Hughes*, 17 Wend. 94, and in *Marsh* v. *Oneida Central Bank*, 34 Barb. 298. Thus treating the deposit balance as an ordinary debt due from the bank to the estate, the case is easily settled by an application of the general provisions of the statute concerning administrators. Every creditor of an estate, against whom a cross-demand exists in its favor, may strike the balance and obtain an allowance for the amount so appearing due him, whether the estate be insolvent or not. By section 22, page 104, Wagner's Statutes, any creditor may establish his demand, though not yet due, with the same incidents and privileges. The proceeding in the Probate Court was,

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therefore, conclusive of the rights of the parties, and the defendant's plea of *res adjudicata* was properly sustained in this cause. The credit given by defendant in obtaining its allowance was not voluntary, as the plaintiff contends, but was compulsory, under the statutory oath of the claimant.

The case of *Ford's Administrator* v. *Thornton*, 3 Leigh, 695, illustrates the principles herein recognized. One Gregory was indebted to a bank by a note at sixty days, and died before its maturity, having on deposit in the bank a sum greater than the amount of the note. His estate was insolvent. It was held that the bank had a right to deduct the whole amount of the note from the sum on deposit, even though there were claims against the estate of superior dignity to the debt due the bank. It thus appears that, between the administrator and the bank, a balancing of accounts was necessary to establish their true relations, even as to the cash on deposit at the intestate's death, before the maturity of his note.

All the judges concurring, the judgment is affirmed.

HORACE B. JOHNSON, Respondent, v. ST. LOUIS DISPATCH COMPANY, Appellant. 2 565 / 87 24

June 26, 1876.

1. A printing and publishing corporation may be held liable in a civil action for libel.

2. To publish in writing an expression of belief that one has committed a felony is actionable *per se;* and the fact that the reasons for the belief are also given will not affect the question, unless those reasons explain away the charge.

3. The words "H. B. J., who disgraced the office now filled by N. C. E., was once accused of stealing a stud-horse. He sued the party of accusers, and at the trial a verdict was brought in for defendants, thus virtually saying that he did steal the horse." *Held,* libelous.

APPEAL from St. Louis Circuit Court.

Affirmed.

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Marshall & Barclay, for appellant, cited: Hall *v.* Adkins, 59 Mo. 144; Towns. on Slander and Libel, 526, sec. 335; Sparkham *v.* Pye, Cro. Jac. 532; Stokes *v.* Arcy, 8 Jones L. 66; Gray *v.* Wayle, Story, 159; Blanchard *v.* Fisk, 2 N. H. 398; Nelson *v.* Musgrove, 10 Mo. 648; Hodgson *v.* Scarlett, 1 B. & Ald. 233; Tozer *v.* Mashford, 4 Eng. Law & Eq. 451; Harrison *v.* King, 4 Price, 45; Hancock *v.* Winter, 7 Taunt. 205; Bush *v.* Smith, 2 Jones, 157; City of St. Louis *v.* Russell, 9 Mo. 507; Blair *v.* Perpetual Ins. Co., 10 Mo. 559; Ruggles *v.* Collier, 43 Mo. 353; Bank of Louisville *v.* Young, 37 Mo, 398; Hannibal & St. Jo. R. R. Co. *v.* Marion County, 36 Mo. 294; Childs *v.* Bank of Missouri, 17 Mo. 213; Orr *v.* Bank of United States *et. al.*, 1 Ohio, 28; Gillett *v.* Missouri Valley R. R. Co., 55 Mo. 315; Underwood *v.* Newport Lyceum, 5 B. Mon. 129; Van Brandt *v.* Schenk, 13 Johns. 414; Philadelphia R. R. Co. *v.* Witts, 4 Whart. 143; Illinois Central R. R. Co. *v.* Downay, 18 Ill. 359; MacManus *v.* Cricket, 1 East, 106; St. Louis & Chicago R. R. Co. *v.* Dalby, 19 Ill. 353; Stevens *v.* Midland County R. R. Co., 10 Exch. 352; The State *v.* Great Works Mill and Mnfg. Co., 10 Me. 41; McClelland *v.* Bank of Cumberland, 24 Me. 566; Mali *v.* Lord, 39 N. Y. 382; Wright *v.* J. & S. Wilcox, 19 Barb. 343; Mason *v.* Styles, 21 Mo. 374; Douglas *v.* Stephens, 18 Mo. 367; The State *v.* Field, 49 Mo. 271; Maloney *v.* Bartley, 3 Camp. 210; Hecker *v.* De Grost, 15 How. Pr. 314.

Lee & Adams and *Henderson & Shields*, for respondent, cited: Gillett *v.* Missouri Valley R. R. Co., 55 Mo. 315; Maynard *v.* Firemen's Fund Ins. Co., 34 Cal. 48; Goodspeed *v.* East Haddam Bank, 22 Conn. 530; Philadelphia, Wilmington & Baltimore R. R. Co. *v.* Quigley, 21 How. 202; Whitfield *v.* Southeastern Ry. Co., 96 Eng. Com. Law Rep. 113; Atlantic and Great Western R. R Co. *v.* Dunn, 19 Ohio St. 162; New Orleans, Jackson & Great Western R. R. Co. *v.* Baily, 40 Miss. 453; Taylor *v.* Grand Trunk Ry. Co., 48 N. H. 304; Hopkins *v.* Atlantic

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& St. Louis R. R. Co., 36 N. H. 9; Malecek *v.* Tower Grove & Lafayette R. R. Co., 57 Mo. 17; Childs *v.* Bank of Missouri, 17 Mo. 213.

BAKEWELL, J., delivered the opinion of the court.

This is an action for libel. The petition states that defendant is a corporation engaged in printing and publishing a newspaper called the *St. Louis Dispatch*, in pursuance of its corporate powers, and that whilst so engaged, on August 5, 1874, whilst plaintiff was an attorney at law, practicing his profession in Jefferson City and elsewhere in Missouri, defendant, maliciously intending to deprive plaintiff of his good name as a citizen and in his profession, and to injure his business, did print and publish in the *St. Louis Dispatch* the following false, scandalous, and malicious defamatory words concerning plaintiff:

"Then there was H. B. Johnson" (meaning plaintiff), "who disgraced the office now filled by H. Clay Ewing. He" (meaning plaintiff) "was once accused of stealing a stud-horse in Lafayette county, Mo. He" (meaning plaintiff) "sued the party of accusers, and, at the trial, where four Federal office-holders made a part of the jury, a verdict was brought in for the defendants; thus virtually saying that he" (meaning plaintiff) "did steal the horse."

Innuendo. That this was meant to charge plaintiff with the crime of grand larceny.

The petition says that all the allegations concerning plaintiff in said publication are false, and were published in a regular issue of defendant's newspaper, by the direction and knowledge of its managers, in due course of defendant's business.

Damages were laid at $50,000.

To this petition defendant demurred, on the ground that the petition does not set forth facts to constitute a cause of action. The Circuit Court, at special term, sustained the demurrer, and, plaintiff declining to plead further, judgment was entered for defendant. On appeal to general term this

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judgment was reversed. Defendant filed a motion for a rehearing, which being overruled, the cause is brought to this court by appeal.

It is claimed by appellant that the Circuit Court at special term properly sustained the demurrer, first, because the words set out constitute no libel *per se;* and, second, because a corporation cannot be guilty of libel.

1. It is argued by appellant that, to make the words libelous *per se*, they must plainly charge a criminal offense, and that these words do not charge plaintiff with grand larceny, but say that he was accused by others of grand larceny, which is a different matter.

But these words set out in the petition, in their plain signification, say that the publishers of the alleged libel think plaintiff a horse thief, and it has been held actionable to say of a man: "I think he is a horse thief." *Dickey* v. *Andros*, 32 Vt. 55. So, asking—as to a forgery—whether the witness did not think it was in G.'s handwriting, and asserting, "I have shown it to persons who said it was in G.'s handwriting," was held to show intent to impress a belief of G.'s guilt of forgery. *Gorham* v. *Ives*, 2 Wend. 534. "I am told that Muma was the man that killed the peddler, and I believe it" were the words. Defendant pleaded that he had been told so. Held insufficient. *Muma* v. *Hauner*, 1,724 Com. D. B. 293.

The rule that, in actions of this nature, words must be taken *mitiori sensu* is now entirely abandoned. The words must be taken in the plain, obvious sense in which they strike the common understanding of the every-day hearer. Now, here it is said of plaintiff that he disgraced an honorable office, and immediately after, as a reason apparently for this serious imputation upon his character, it is alleged that he was accused of stealing a horse; that those who charged him with it were by a jury acquitted of wrong in making the charge; and that this was virtually saying that defendant stole the horse. Instead of sending the antidote with

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the poison—as in the case of one who says, "he is a thief, for he owes money which he won't pay," thus making it clear that no felony is imputed—the additional words are rather a barb to the shaft to make it stick in the wound.

As a rule, a court, on a demurrer to a petition in an action for libel, will not give a mild construction to the words, but will see if there be anything in the language which, by reasonable intendment, is actionable. *Moover* v. *Pigott*, 4 I. R. C. L. 54. And ambiguous, figurative, and even ironical language will be understood according to the sense it naturally conveys to the ordinary understanding. One-half of the English language, as has been truly said, is interpreted by the context. It has been held actionable to say, "You are no thief;" and also to say of a man, "I know what Snell is, and I know what I am; I never committed the crime against nature." *Snell* v. *Webling*, 2 Lev. 150.

We are of opinion that the words used in this publication were equivalent to saying, "We believe that H. B. Johnson stole a horse," and that these words are actionable and libelous *per se*. The reasons given for the belief by no means explain away the accusation. In *Hall* v. *Adkins*, 59 Mo. 144, the words were held not actionable because, though the words spoken charged felony, yet they were accompanied with other words explaining the real character of the alleged offense, and showing that no felony had been committed. And this is what is meant by sending the antidote with the poison. But to say that I believe a man to be a thief is to say that he is a thief; for, when I say that he is a thief, I only express my belief of that fact, and am never taken as expressing more than my moral certainty—not my absolute certainty—of the truth of the accusation. To say that I believe that a man is a thief; that he disgraces an honorable station; that he has been accused of larceny, and his accusers acquitted of all wrong in making the charge;

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and that this acquittal was a virtual conviction of the accused, is to say more than simply to say he is a thief.

If I speak the truth in saying that the charge of felony was made, the accusers sued, and discharged, this may be in mitigation of damages; and, if a publisher of a newspaper, I may perhaps be able to show good reason for making the publication; but the fact remains that I have stigmatized another as a thief, and I am clearly liable to an action for the words.

2. We are of opinion that a corporation may be held liable in damages for libel. If the contrary were the law, there would be almost perfect immunity for the newspaper press—most of the large newspapers of the world being the property of corporations. But there can be no question whatever, in the present state of the law, that a printing and publishing corporation is liable to an action of damages for libel. Corporations are liable for the tortious acts of their agents, when done within the scope of their employment; and, like natural persons, may be punished by exemplary damages. *Gillett* v. *Missouri R. R. Co.*, 55 Mo. 315; *Malecek* v. *Tower Grove R. R. Co.*, 57 Mo. 17. It was formerly held that a corporation, having no soul, could not do a moral act, and therefore could not be liable in tort; but that doctrine is entirely obsolete; and if the case of *Childs* v. *Bank of Missouri*, 17 Mo. 213, decides that a corporation cannot be punished in damages, it has been overruled. We do not think, however, that any such point was necessarily involved in that case. The court held there that a banking corporation cannot be held liable for a malicious prosecution; but the prosecution of criminals is not clearly within the scope of the powers of a bank. Publishing news is clearly within the scope of the powers of an incorporated publishing company; and, if it abused its power by publishing injurious falsehood as news, it is liable in a civil action precisely as a private individual.

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We think, therefore, that the Circuit Court at special term erred in sustaining the demurrer, and that plaintiff's petition contains facts sufficient to constitute a cause of action.

The judgment of Circuit Court at general term, reversing the judgment of the Circuit Court at special term and remanding the cause, is affirmed. All the judges concur.

HENRY SCHWEICKHARDT, Respondent, *v.* CITY OF ST. LOUIS *et al.*, Appellants.

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34	609
2	571
41	475
2	571
74	147
2	571
78	381
2	571
174s	278

July 3, 1876.

1. When A employs B to do certain work for him, but does not in any way control or superintend him, he is not liable for injury to third persons, caused by the negligence of B.
2. If A, B, and C are sued by D, and a jury sworn to try the issues as to them all, a verdict finding the issues against A and B only, and saying nothing as to C, should not be received; and a judgment rendered upon such a verdict will be reversed.
3. When the city of St. Louis and an individual are sued jointly for damages occasioned by the negligence of the latter, and the suit is dismissed as to the individual, the record not showing that he is dead, a judgment taken thereafter against the city will be reversed.
4. To render a city liable for an injury occasioned by the dangerous condition of a street or sidewalk, resulting from the negligence or malfeasance of private persons engaged in erecting or repairing buildings, such dangerous condition must be known to the city authorities, and they must have neglected to enforce the municipal regulations respecting persons so engaged.
5. In general, a city is liable for injuries resulting from the dangerous condition of a street or sidewalk only when that condition constitutes a nuisance.
6. There is a legal distinction between a hole or pit occasioned by the subsidence of the soil, or the decay of the materials of which a street or sidewalk is composed, and an excavation which is a necessary part of an improvement.

APPEAL from St. Louis Circuit Court.

Reversed and remanded.

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James Taussig, for appellants Brown and Schneider, cited: Rev. Ord., ch. 13, Art. 3, sec. 2.

E. T. Farish, for appellant the city of St. Louis, cited: Adams *v.* Carlisle, 21 Pick. 146; Holmon *v.* Townsend, 13 Metc. 297; Horton *v.* Ipswick, 12 Cush. 488; Tuttle *v.* Holyoke, 6 Gray, 447; Seads *v.* Dennis, 105 Mass. 310; James *v.* San Francisco, 6 Cal. 528; Barry *v.* City of St. Louis, 17 Mo. 121; Green *v.* Portland, 32 Me. 431; Murphy *v.* Chicago, 29 Ill. 279.

Gottschalk, for appellants Brown and Schnaider, cited: Barry *v.* City of St. Louis, 17 Mo. 121; Morgan *v.* Bowman, 22 Mo. 538; Darnstadter *v.* Moynehan, 27 Mich. 188; Barbour *v.* White, 37 Ill. 164; Wood *et al.* *v.* McGuire, 17 Geo. 361.

H. N. Hart, and *Jecko & Hospes*, for respondent, cited: Blake *v.* City of St. Louis, 40 Mo. 569; Basset *v.* City of St. Joseph, 53 Mo. 290; Winship *v.* Enfield, 42 N. H. 197; Market *v.* City of St. Louis, 56 Mo. 189.

GANTT, P. J., delivered the opinion of the court.

Schweickhardt brought an action, on January 20, 1872, against James Lynch, the city of St. Louis, B. Gratz Brown, Philip W. Schneider, John D. Stone, and Thomas Allen. The amended petition showed that on or about December 11, 1871, the defendants caused to be dug at the intersection of Fifth and Market streets, in the city of St. Louis, a deep and dangerous excavation, and placed in the public street at that point large rocks and other obstructions, rendering the street unsafe, and without signals in the night-time, and plaintiff, walking there, fell, was gravely injured, etc.

Lynch answered, denying that the streets were rendered dangerous by any digging; denying the negligent leaving of the place without signals in the night-time; denying also the injury of plaintiff.

Brown and Schneider denied their negligence; denied that they dug a dangerous excavation, or left it unguarded,

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and without signals; ignored the injury of the plaintiff, and averred that they, being partners, contracted with James Lynch that he should cut and dress the flagging required to make a sidewalk at corner of Fifth and Market, of red granite, to be delivered to him by Brown and Schneider near Lesperance street, in St. Louis; that they did so deliver such granite to Lynch near Lesperance street, and Lynch did lay the sidewalk at Fifth and Market; but Brown and Schneider had no possession of the street nor sidewalk, nor of the work, and are not responsible for anything done or omitted by Lynch or other persons there.

The city of St. Louis answered, denying that it caused to be dug any such excavation, etc., or placed rock or other obstructions in the streets, or carelessly left any dangerous place unguarded; ignoring the injuries of plaintiff, but denying that, if injured, it was by any fault of the city.

Thomas Allen answered, denying the digging of the excavation, the placing of the obstructions, or the neglect of the precautions stated in the petition, and ignoring the injuries of the plaintiff; alleging that he contracted with Stacey and Stone to build, complete, and deliver to him the building at Fifth and Market streets, and the sidewalks adjoining the same; and that, from the time of the contract until long after the occurrence of the injury complained of, he had no possession, control, or direction of the building, sidewalk, or street.

There was a reply denying the contract between Allen and Stacey and Stone; a reply denying the contract between Lynch and Brown and Schneider; a separate answer was filed by Stone, denying the making of a dangerous excavation, and negligence, and ignoring the injuries of plaintiff.

The cause was tried at the December term, 1874, and the suit was dismissed as to James Lynch. The jury found a verdict against the city of St. Louis, B. Gratz Brown, Thomas Allen, and Philip W. Schneider, in the sum of $3,500. Nothing was said in the verdict of Stone or Stacey. The

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court thereupon gave judgment against the city, Allen, Brown, and Schneider for $3,500 and costs.

A motion for a new trial, and a motion in arrest of judgment, were overruled, and an appeal was taken to the general term, where the judgment was affirmed.

By the bill of exceptions it appeared that Schweickhardt fell and hurt himself, at the corner of Fifth and Market streets, on December 11, 1871, in the afternoon, after six o'clock. There was no guard and no light.

The plaintiff read section 2, of Article 3, of chapter 13, pages 427 and 428, directing all persons who dig an excavation in or near a highway in St. Louis to cause it to be fenced by a substantial fence, not less than three feet high, the boards of which shall not be more than one foot apart, and cause red lights to be hoisted conspicuously near such excavation, and kept burning through the night.

Sharpenberg testified, for plaintiff, that large granite blocks were lying in the street, near the corner of Fifth and Market. There was an excavation of two feet; some logs. Two of the broad flag-stones were laid before plaintiff was hurt. Sometimes lights were there, sometimes not. Witness, who was a policeman, notified Lynch, to whom Schneider gave the contract of laying the pavement, that no lights were there; notified him three times. Reported him once. Witness had seen Mr. Allen about the building; also saw Schneider looking at the work as it was going on, giving no direction; saw Stone there bossing the men who were putting up the building; saw city officials passing there; no fence to the excavation; no light the night of the accident.

There was evidence tending to show the injuries sustained by the plaintiff.

On the part of the defendants, Heffner, assistant city engineer, was examined to show the width of the streets and of the sidewalks at the corner of Fifth and Market streets. Fruin, who assisted plaintiff into Schneider's

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saloon when he was hurt, testified to the width of the sidewalk along which plaintiff might have passed. Durgan testified that, on the evening of the accident, about four o'clock, P. M., he lit the lamp and put up guards at the place; witness and his father, whom he called James Lynch, and a man named Sweeney, were at work there. Lynch was laying the flagstones. Lynch has died during the pendency of the suit, and, when the plaintiff's case was closed and part of defendants' case put in, the plaintiff dismissed as to him. He seems to have had no administrator, and to have died wholly insolvent.

Defendants objected to the dismissal of the suit as to him, after the introduction of evidence which, it was alleged, but for his being a party, was inadmissible. The court permitted it, however.

Stone testified that he and Stacey were the contractors for Mr. Allen's building; that Stacey was dead before the injury complained of. Stacey and Stone had the contract for the building, but nothing to do with the pavement of the sidewalk. It was flagged with granite slabs. Mr. Allen testified that he contracted with Brown and Schneider for the flagging of the pavement, and did not know that they made a sub-contract with James Lynch. Witness paid Schneider for it. Barrett, the architect and superintendent of the building, testified. His testimony was not important. Murphy testified that he supervised, under Barrett, the carpenters' work; that Lynch did the flagging in fact, but how employed, witness did not know. Schneider was occasionally there; he took charge after Lynch left; Lynch worked about three weeks.

Evidence was given of the issue of a building permit to Thomas Allen, on the application of Stacey and Stone, contractors; and sections 1 and 2 of the city ordinances (pp. 350, 351, of Rev. Ord. 1871) were read by Mr. Allen's counsel. Also the contract between James Lynch and Brown and Schneider was read, dated November 7, 1871,

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for laying the flagging in front of Allen's building. Meahcagan, on behalf of Brown and Schneider, testified that Schneider took charge of the work after the making of the contract, and finished it towards the middle of January, 1872. That prior to that time they furnished rock to Lynch by virtue of a contract with him, but had nothing to do with laying the rock. Brown and Schneider had a contract with Allen, and Lynch made a sub-contract with Brown and Schneider.

The court instructed the jury as follows:

"If you believe from the evidence that if it even appears that the plaintiff, at and just before the happening of the injury, knew of the dangerous condition of the street, this alone will not prevent his recovery in this action.

"If you believe from, etc., that the defendants carelessly or negligently placed obstructions, or caused obstructions to be so placed, in or across Fifth street, at or near the point mentioned in the petition, and that plaintiff, while carefully passing in or along said street, fell over said obstructions and was injured, then the jury will find for the plaintiff, and against such defendant or defendants who so placed said obstructions, or caused the same to be so placed.

"The plaintiff was bound to exercise only such care and prudence as is ordinarily done by persons of ordinary capacity and prudence under similar circumstances, and was not bound to use extraordinary care or prudence to avoid the accident.

"If you believe from, etc., that Fifth street, at or near the point mentioned in the petition, was in an unsafe and dangerous condition, and that the defendant the city of St. Louis, or its officers and agents, knew said fact, and that the plaintiff, while passing in and along said street, was, by reason of the unsafe and dangerous condition thereof, and without fault, etc., on his part, thrown down and injured, you will find against the city.

"If you find for plaintiff, you will assess damages at such

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sum, not exceeding $25,000, as will be a fair and just compensation for the injury sustained by plaintiff, taking into consideration his position in life, the nature of his injuries, whether permanent or transient," etc.

At the instance of the city and Brown and Schneider, the court instructed the jury as follows:

"If you believe from, etc., that, on the night of the alleged accident, plaintiff passed among the obstructions and caused the injury by an act of negligence, in stepping on a round log, and that stepping on that log was a careless act, then you will find for defendant.

"If plaintiff was guilty of contributory negligence, the verdict must be for defendants.

"Only actual compensation is recoverable. False swearing discredits the witness who swears falsely.

"Hearsay is not evidence; so far as admitted. it is to be disregarded.

"The jury must find for Stone, unless plaintiff has shown that Stone undertook to lay the granite flagging and the illuminated tiles in front of Allen's building, at corner of Fifth and Market, or that Stone and Stacey, or Stone alone, directed and controlled the workmen in laying said flagging and illuminated tiles."

To the giving of these Mr. Allen excepted, and asked the following:

1. "You must find for defendant Allen."

2. "If the work was done by Brown and Schneider, or Lynch, by contract with Allen, did the work in question, Allen is not answerable."

There was a motion for a new trial, and a motion in arrest, which were overruled, and defendants appealed to this court, saving all exceptions. Several questions arise respecting the relations of the parties to each other.

1. Was Allen the principal of Brown and Schneider in putting down the granite flagging at the corner of Fifth and Market?

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2. Was Lynch under the control of Brown and Schneider? We look into the contract by which the engagement of Brown and Schneider was defined. Though the written memorandum of this contract was not signed by Brown and Schneider, it is sufficiently clear that its terms were conformable to that memorandum, and we are able practically to treat that paper as showing the stipulations of Brown and Schneider with Allen. They agreed, in October, 1871, to put down for him a granite pavement. After the making of this contract, Mr. Allen left the performance of it to Brown and Schneider alone. They seem to have underlet it to Lynch, but Allen had no power of interfering in the management of the job except that reversionary right which is necessarily reserved to every owner of land in such cases. He could not, without becoming a trespasser, have controlled the manner in which Brown and Schneider were completing the work, so long as they confined themselves to the performance of the contract; and it will hardly be contended that the law made him a superintendent of it, and that he was bound to intervene as soon as the first symptom of negligence appeared on their part. Brown and Schneider were contractors with, and not servants of, Allen; and, as was held by the Supreme Court of Missouri, in *Morgan* v. *Bowman*, 22 Mo. 538, Allen was not liable for any negligent performance by Brown and Schneider of the contract they had made. The maxim of *respondeat superior* does not apply to such a case, because the relation of master and servant did not exist. If Allen is liable in the present action, it must be for some negligence of his own—not for any committed by Brown and Schneider, considered as his agents.

2. As to the relations between Brown and Schneider and Lynch, they appear plainly enough. A contract in writing was made between them and him, on November 7, 1871, by which they divided with him the work they assumed to do for Allen. They agreed to furnish to Lynch, at the foot of Les-

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perance street, the rough stone which, for a stipulated price, he was to cut, dress, haul, and set in the sidewalk. He was to do this part of the work for, and of course to receive his price from, Brown and Schneider. The contract was roughly drawn, but its meaning is plain enough. Lynch appears by this paper to have been the employee or servant of Brown and Schneider to do part of the work going to make up the whole contract they had made with Allen. The practical construction of Lynch's engagement by Brown and Schneider is in conformity with this view. At a date somewhat subsequent to the injury complained of, they removed him from the charge of the work at Allen's building, and took it in hand themselves.

3. A further inquiry of importance respects the relations of the city to the accident complained of.

It seems to be settled that, if the work had been city work, the contractor, and not the city, would have been alone liable for the resulting damage. *Barry* v. *City of St. Louis*, 17 Mo. 121. It is sought to render the city responsible here because of the matters testified to by W. Sharpenberg. He says that for a period of six weeks the street at that quarter was in a dangerous condition, and that various city officers passed by the spot and must have known of its state. If the street was in a dangerous condition, and that condition being known to the city authorities, no steps were taken to cure the danger, the city is liable for the resulting damages. *Blake* v. *City of St. Louis*, 45 Mo. 569; *Smith* v. *City of St. Joseph*, 45 Mo. 449. But the *gist* of such an action is the negligence of the municipality. The thoroughfare must be out of repair, the city must be aware of this, and must have neglected to put it in a safe condition, and the party injured must not have been grossly negligent.

By "dangerous condition" is meant, we think, something more than the accumulation of materials on the neigh-

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borhood of a building undergoing erection or repair, or that excavation, more or less deep, which is needed in order to put down a sidewalk of stone slabs. A temporary state of disorder is absolutely inseparable from improvement of certain kinds; a street or sidewalk is rendered impassable, or partially impassable, during the progress of the work; it is matter of familiar experience that a part of it is for the time withdrawn from public use, in order to allow the doing of the work needed for the embellishment or convenience of the city; and all that can reasonably be demanded of the city, under such circumstances, is the taking of due care, or the enforcement of the regulations made (if there be such competent regulations), for securing passengers of ordinary prudence from danger. The ordinances of the city require the erection of guards, and the putting up of signals during the night, at such points. They impose on the parties doing the work the duty of doing this; and all that the city can be made liable for is the neglect to enforce the performance of that duty. The performance can only be enforced—indeed, the term employed is not very accurate—by exacting the penalties attendant on a violation of the ordinances, if those ordinances be a reasonable provision against the neglect of the duty. A case of neglect must be brought home to the knowledge of the city, and no steps must have been taken to compel care. It does not appear that the excavation in this case was of a peculiarly dangerous nature. There was a temporary sidewalk of plank, on which, if there had been light, any person of ordinary prudence might have walked in safety. The want of light, and the want of guards, seem to have been the particulars of the negligence of Lynch. The evidence shows that this light and these guards were sometimes present and sometimes absent, and it would appear that both were absent on the evening of the accident. But there is no evidence whatever that the absence of either on that evening was

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known to the city; and there is evidence that the police of the city had, on several occasions, caused Lynch to put up light and guards at the point of danger.

The latest decision of our Supreme Court on this subject (*Barrett* v. *City of St. Joseph*, 53 Mo. 290) declares that, to render the municipality liable, the dangerous state of the street or sidewalk must have been known to the authorities, and carelessly permitted to continue. There is an obvious distinction between a hole or excavation which is the result of subsidence of the soil, or decay of the material of which the street is composed, and a temporary excavation which is a necessary part of an important improvement. In respect of the last, in order to render the city liable, negligence different both in kind and degree from that disclosed by this record will be required. An excavation of the first description is nothing but a nuisance, if it be sufficient to obstruct travel or endanger travelers. One of the second description can with no propriety be so termed; and, without the toleration of obstructions of this nature, a house, or a street, or a sidewalk could neither be constructed nor repaired.

The counsel for the city dwells with earnestness on the dismissal of the suit against Lynch (who, if any one, was the party whose negligence caused the injury) and the taking of judgment against the city, contrary to the provisions of section 13, of Article 12, of the Charter of 1870, and Mr. Allen's counsel makes the same point. Each is entitled to make and press it. Clearly the plaintiff had no right to dismiss his suit against Lynch and continue his action against the city. This is plainly forbidden by the section of the charter above referred to, and the record proper certainly shows that this prohibition has been disregarded. But we are told that the evidence preserved in the bill of exceptions shows that Lynch died before the trial. His death, whenever it occurred, abated the action (sec. 30 of Art. 12, Gen. Stat.) unless the passage of the act incorporating

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St. Louis, referred to, causes such an action as the present to survive against the executor or administrator of a tort-feasor. We do not think that this consequence can be claimed for that passage; and we are of opinion that the suit was at an end against Lynch if he were really dead before the trial. But there is no suggestion or allegation of his death in the pleadings, and, of course, no finding of the fact. On the contrary, the suit is dismissed as to him, after all the evidence had been put in, on the day when the judgment was taken against the city; and, however we may be convinced *aliunde* that he was dead, the record does not show it, but does show a condition of things for which no justification is offered, and which, without such justification, is forbidden by law. As the judgment must be reversed for other reasons, we need not dwell upon the negligence which permits the record to be silent respecting a matter which undoubtedly influenced materially the action of the Circuit Court.

5. It is further objected that there was a total failure on the part of the jury to find a verdict as to Stone; that they were sworn to try the issues joined between the plaintiff and all the defendants, of whom Stone was one; that they only performed part of this duty; that the court possessed no power to give any judgment as to Stone; that it nevertheless gave judgment in his favor; and that the judgment, being an entirety, and erroneous in this particular, must be set aside altogether.

The verdict and judgment are in the following words and figures:

"Henry Schweickhardt *v.* City of St. Louis, B. Gratz Brown, Philip W. Schneider, David D. Stone, Thos. Allen, and James Lynch.	Tuesday, December 15, 1874. Now at this day come the parties, by their respective attorneys, and also come the jurors impaneled and sworn herein, whereupon the plaint-

iff dismissed this suit as against the defendant James Lynch,

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and the jurors aforesaid, having agreed upon their verdict, upon their oaths aforesaid say they find for the plaintiff, against the defendants the city of St. Louis, B. Gratz Brown, Philip W. Schneider, and Thomas Allen, and assess the damages at the sum of $3,500. It is therefore considered by the court that the plaintiff take nothing by his suit in this behalf against the defendants James Lynch and John D. Stone, but that the said defendants go hence without day, etc., and that the plaintiff recover of said defendants, the city of St. Louis," etc.

It appears by the record that the plaintiff filed an amended petition; that the city of St. Louis, Brown, Schneider, Stone, Lynch, and Allen filed each a separate answer; that replications were filed to the answers of the city, Brown, Schneider, and Allen, and that thereupon a jury was sworn and the cause tried, resulting as above stated.

We think that this judgment cannot stand upon this verdict. We are of opinion that the verdict was imperfect, and should not have been received; and that the judgment rendered by the court was inconsistent with, and unwarranted by, it.

"A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion be brought against one for intruding into a messuage and 100 acres of land, upon the general issue the jury finds against the defendant for the land, but saith nothing for the house, this is insufficient for the whole, and so was it twice adjudged." Co. Lit. 227, *a*. To the same effect see *Hooper* v. *Shepherd*, 2 Strange, 1089; *Miller* v. *Trets*, 1 Ld. Raym. 324; *Patterson* v. *United States*, 2 Wheat. 221; *Holmes* v. *Wood*, 5 Mass. 1; *Kerr* v. *Hawthorne*, 4 Yeates, 293; *Davidson* v. *Bond*, 12 Ill. 84; *Barbour* v. *White*, 37 Ill. 164; *Wood* v. *Maguire's Children*, 17 Ga. 361.

This objection is by no means one of form only, nor one

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of which the other defendants cannot take advantage. It is far from being immaterial whether, when several are sued as jointly liable for a tort, there is a verdict in favor of one or more, while as to the rest the verdict and judgment are for the plaintiff. Moreover, as the several defendants, if jointly liable, are subject to contribution, those against whom the verdict is given are interested in having as many assistants in bearing the burden as possible. The jury here left it undetermined whether Stone was liable to any share of this burden. The court thereupon undertook to declare that he was not liable; and, without pausing to inquire whether such a judgment, if not reversed, would be a bar to an action for contribution, the other defendants are plainly damnified by being subjected to an execution, in advance of any determination of their relations to Stone, as to the amount they are thus compelled to pay.

With the concurrence of all the judges, the judgment is reversed, and the cause remanded for a new trial.

PATRICK B. RING, Respondent, *v.* WILLIAM C. JAMISON, Administrator of PETER LINDELL, Appellant.

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July 3, 1876.

1. The contract of an infant may be ratified by an oral promise, made after he comes of age, to pay the debt.
2. It is not necessary that the person ratifying his contract, made as an infant, should know that he is not legally bound at the time he makes the new promise.
3. Every new item in a running open account draws with it all preceding items, and is a recognition of the balance due, whether the account be mutual or not.
4. Counsel may sometimes ask a witness a question the answer to which may degrade him, but it is in the discretion of the court to require an answer. The court may also, under certain circumstances, forbid such questions to be asked.

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5. A party may testify in his own behalf as to matter not directly relating to the contract in issue, even though the other party to the contract be dead.

6. In a suit against an administrator, where the administrator himself is present defending during the trial, and waived notice of demand in the Probate Court, it is too late after verdict to object that no formal proof that he was administrator was made.

APPEAL from St. Louis Circuit Court.

Affirmed.

Cline, Jamison & Day, for appellant, cited: 1 Greenl. on Ev. (7th ed.) 596–597, secs. 458, 459; 1 Wag. Stat. 120, sec. 8; Coughlin v. Haeussler, 50 Mo. 128; McLean v. Thorp, 3 Mo. 215; Poe v. Domic *et al.*, 54 Mo. 124; Stanton v. Ryan, 41 Mo. 510; Baker v. Kennett, 54 Mo. 92; Ford v. Phillips, 1 Pick. 202; Smith v. Mayo, 9 Mass. 64; Curtin v. Patton, 11 Serg. & R. 307; Hinsby v. Margarity, 3 Barr, 428.

Matthew O'Reilly, for respondent, cited: Greenl. on Ev., sec. 457; Poe *et al.* v. Domic *et al.*, 54 Mo. 124; Looker v. Davis *et al.*, 47 Mo. 143; Highley v. Barron, 40 Mo. 106; Stiles v. Smith, 55 Mo. 363.

BAKEWELL, J., delivered the opinion of the court.

This was a suit originally instituted in the Probate Court of St. Louis county, against the estate of Peter Lindell, deceased, for money loaned to defendants' intestate, money paid out for him, and articles of jewelry sold to him from time to time, from February 10, 1868, to August 3, 1871, making an aggregate of $7,727.75. There were no credits. Judgment was for defendant in the Probate Court. In the Circuit Court a trial was had before a jury, and verdict and judgment for the plaintiff for $7,707.25.

Peter Lindell became of age on October 10, 1870. Defendant, Jamison, was his curator, and supplied him with all necessaries during his minority. Lindell appears to have been a young man of expensive habits, and the evidence for plaintiff is the testimony of the associates of Lindell and ministers to his pleasures, and of his servants. It

appears that he was rich, and there is testimony that he was liberal of his money, and rather made a point of paying his racing and gambling debts. In appears also that plaintiff had, at times, control of large amounts of money. The deceased seems to have been often embarrassed for ready money. One witness, a bar-keeper, testifies to Lindell going over the items of this account with plaintiff, after Lindell obtained his majority, recognizing its correctness, adding it up; that Ring then made a pencil note of the sum total on a card, or in the memorandum book in which the account was kept, and that Lindell promised to pay it. On the other hand, there was evidence of deceased, on one occasion, giving to plaintiff a large sum of money, at his request, declaring at the same time, with great vehemence, that plaintiff must in future look elsewhere for money, for he would furnish him no more. The mother of deceased swore that plaintiff admitted to her, after the death of her son, that he owed deceased $700, and proposed to her that they should trump up this claim against his estate and divide the amount allowed. In short, the evidence was contradictory, and cannot be reconciled.

The court gave the following instruction at the instance of plaintiff:

"If the jury believe from the evidence that, on or about 23rd April, 1872, Patrick B. Ring and Peter Lindell had an accounting and a settlement between them of the money advanced or loaned by Ring to Lindell at sundry times prior to said date; and that at the said settlement it was found that said Lindell admitted that he was indebted to Ring in the aggregate amount of the several sums taken into account in said settlement, as set forth in the settlement thereof filed in the cause, amounting in the aggregate to the sum of $7,727.25; and that said Lindell promised to pay said sum to said Ring; and that, at the time of making said promise, said Lindell was over the age of 21 years, then the jury will find for the plaintiff so much of said

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money as they may believe from the evidence is still due to said Ring, with interest thereon, at the rate of 6 per cent. per annum, from the time said Lindell promised to pay the same."

To the giving of this instruction defendants excepted.

The following instruction was given at the instance of defendants:

"If the jury believe from the evidence that Patrick B. Ring, the plaintiff, owed Peter Lindell at the time of his death, they will find for the defendants."

And the following instructions were asked by defendants, and refused:

1. "The acknowledgment of indebtedness by Peter Lindell after he became of age, believing himself liable to pay the same, is not a ratification of the account sued upon; and, if the account sued upon accrued whilst Peter Lindell was a minor, under the age of twenty-one years, the jury will find a verdict for defendants."

2. "If any of the items of the account sued upon accrued more than five years prior to the commencement of this suit, then the plaintiff is not entitled to recover for such items."

3. "If the curator of Peter Lindell supplied him with all necessaries while he was a minor, and that the account sued upon accrued while Peter Lindell was a minor, then the plaintiff cannot recover."

"If the jury believe from the evidence that the curator of Peter Lindell supplied him with all necessaries while he was a minor, and that the plaintiff loaned him money, or sold him diamonds or other property, as mentioned in the account sued upon, while he was a minor, then the said plaintiff cannot recover on the same."

To the refusal of the court to give any of these instructions defendant duly excepted, and in due time filed his motion for a new trial, which being overruled, the cause is brought before us by appeal.

1. We see no error in the instruction given for plaintiff.

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An infant may avoid his contract, if not for necessaries; but he may also ratify it, and he may do this by word only. A mere acknowledgment that the debt is due is not enough; but a promise, expressed or implied, makes him liable. In the case at bar there was sufficient evidence of an express promise to warrant the instruction. There is no pretense that the promise was extorted or conditional.

2. The first instruction refused to defendant was properly refused, because, though it is true that a mere naked acknowledgment of indebtedness would not alone amount to a ratification, the instruction, as worded, was calculated to mislead. It was not necessary, to make the ratification valid, that Lindell should know, at the time of promising to pay the debt contracted when an infant, that he was not legally liable for it. If he knew all the facts, that is sufficient; ignorance of the law should not shield an adult in this more than in any other case.

3. The second instruction was properly refused, because the account was a running account, and would not be barred until the last item was barred. It is true that the account was not mutual, having no credits; but it seems to be held in Missouri, whatever may be the rule in some other States, that every new item in a running account draws after it all preceding items, and is a recognition of the balance when it shall be struck.

It is true that, in *Penn* v. *Watson*, 20 Mo. 16, there were mutual accounts and a set-off; but the question has been repeatedly brought before our Supreme Court in matters growing out of accounts under the mechanics' lien law, and the law of boats and vessels, where an entire running account has been brought within the operation of the lien by the later items.

Stine v. *Austin*, 9 Mo. 558, was a case in which it was maintained that the plaintiff, a mechanic, was entitled to recover only so much of the account as accrued within six months before filing the lien. But the court held that, as a

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running account, it constituted but one demand, which accrued only when the last item was furnished.

The difference between a running account and one that does not run is that, in the latter, each item is a separate cause of action in itself. The minds of the parties are presumed to have concurred only as to the single transaction. But, in the case of a running account, according to the doctrine of relation, the subsequent acts relate back each to the preceding act, and all the original acts. The account sued on embraces forty-seven items, running through, and pretty evenly distributed through, about forty months, from February, 1868, to August, 1871. The items seem to have been jotted down in a memorandum book, carried on his person, by Ring, and, after the last item accrued, were added up by Lindell and Ring together, the amount agreed to, and marked by Ring, in Lindell's presence, in pencil on the memorandum book or on a card. The account seems to have been kept open at the instance of Lindell. Where it is specially agreed, or impliedly understood, between the parties that the account is to be kept open and continued as one and the same continuous transaction and course of dealing, the account is considered, in this State, as one continuous account and one demand.

It may be said that the Missouri cases in which it has been so held (12 Mo. 477; 16 Mo. 266; 36 Mo. 446; and 40 Mo. 244) were decided in actions based upon a statute which requires that the suit shall be commenced within nine months after the "true date of the last item in the account upon which the action is founded;" and that the statute says nothing of the mutuality of the account, and may be said to suppose that the items may be all on one side. The statute as to boats and vessels, it is true, says nothing of the mutuality of the account; but *Stine* v. *Austin*, quoted above, was decided under the mechanics' lien law of 1835, which, like our present statute on the subject, contemplates an account on which all just credits are given.

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In *Finney* v. *Brant*, 19 Mo. 45, it appears from the statement of the case that Finney paid out moneys for Brant under the following circumstances: Brant and many others, about twenty-five in all, entered into an agreement appointing certain of their number a committee to employ counsel and conduct the defense of certain suits involving the title to land in which all the contracting parties had an interest. The parties to the agreement were to pay to this committee, or their successors, such amounts as might be assessed from time to time to defray the expenses of the defense, in proportion of the value of their several interests. Several counsel were employed to defend the two suits already brought, at a fee of $2,000 to each of four legal firms, one-half in six months, and the remainder on the final determination of either of the suits. An assessment was made against each of the signers of the agreement for his proportionate share of the counsel fees, and a draft drawn by the committee in favor of each of the counsel upon each of the parties to the agreement, payable in installments as the fees became due. Brant refused to accept the draft drawn on him for his share of the counsel fees; and his share was paid by the several members of the committee, each member paying separate sums at different times. Finney brought suit, in 1853, to recover the amount thus paid by him for Brant. Some of the payments were made by Finney in 1846, and others in 1852, as they became due by the terms of the draft and of the agreement under which counsel were employed. Amongst other defenses set up by Brant was the statute of limitations. But the Supreme Court held that these payments were a running account, and that the last item brought the whole within the statutory time. The authority of this case, which seems precisely in point, is unshaken, we believe, by subsequent decisions, and is binding upon us.

There can be no question that the weight of authority in other States is in favor of the view that a running account

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must be a mutual account, and that, in order that entries on one side or the other should take the older items out of the statute, there must be mutual dealings and items on both sides. This is the rule in Maine, Massachusetts, New York, New Jersey, Pennsylvania, Indiana, Texas, and perhaps in other States. But, as has been shown, there is a different rule in Missouri. In this State—where the account sued on is a running account, kept open by agreement, express or implied, between the parties, constituting really one bill composed of separate items, morally connected one with another, so that it is clear that each separate item is not meant to constitute a new and independent contract—each new item draws the preceding items to itself, whether the account contain credits or counter-charges, and is a mutual one, or not. Such entries constitute an account in an improper sense, and in the sense in which the word is sometimes used, as in the mechanics' lien law, though not containing a detailed statement of mutual debts and credits.

4. During the progress of the cause defendant's counsel asked a witness whether he had been arrested for larceny. The question was excluded. Whether the witness could have been compelled to answer the question is a point on which, in the absence of express authority, opinions have been very much divided. The better rule seems to be that the witness cannot be compelled to answer a question the answer to which will tend to degrade him; though it must be admitted that grave modern authorities point in favor of compelling an answer, which, when given, cannot, however, be contradicted. The matter of compelling an answer must be left, we think, to the sound discretion of the court. But the question here is, may the question be asked? And, if that be decided in the affirmative, the doubt as to whether it must be answered seems comparatively unimportant, as the object of cross-examining counsel is sufficiently attained by putting such a question, when silence is tantamount to confession, and produces ordinarily the desired effect of

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discrediting the witness of whom the disgraceful fact is known or believed by counsel to be true. It seems to be settled that the question may be asked, but the rule is not absolute, for it is said that the court has a discretion so far as this: that it may prevent the recalling in this manner of discreditable circumstances of a date long past, and that it is not the policy of the law to allow the character of men, who have rehabilitated themselves by a course of steady conduct, to be smirched by throwing up to them in court the follies of their youth. We have no doubt that even here the court has a discretion, and may protect a citizen of good fame against the insult of such questions, if directed to remote occurrences. Whilst, then, we think that the question, under the circumstances of this case, ought certainly to have been allowed, we will not establish a precedent that such questions may, under all circumstances, be asked.

But, if it was error to refuse to allow the question to be put, under the circumstances of this case, was this such error as to prejudice defendant, and warrant a reversal of the case? We do not think it was. The question was excluded by the court. But it was, in fact, put in the presence of the jury. The effect, to a considerable extent, must have been produced; for it is quite evident that a man who had not been arrested for larceny would have answered "no" before an objection could be made; or, if too slow-witted for that, would have asked the court, out of regard to his character, to allow an answer to be made. So far as this witness is concerned, we cannot see, then, that any mischief was done; and it is not suggested that counsel desired to put similar questions to any other witness, or that they were deterred from doing so by this ruling of the court.

5. It is also assigned for error that plaintiff was allowed to testify in his own behalf. He was quite competent to testify as to facts occurring since the death of the other

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contracting party; and all of his testimony was of this character, if we except some evidence in rebuttal of one Dickson, as to an immaterial conversation between plaintiff and the deceased, which had no connection with the cause of action. To exclude a witness on account of the death of the other party, the matter offered in evidence must be something relating to the contract in issue, as to which the lips of the other party are sealed in death. *Poe* v. *Domic*, 54 Mo. 119.

6. Lastly, it is said that there was no evidence that defendant, William C. Jamison, is administrator of the deceased. Jamison himself was present during the trial. This proceeding is an appeal from the Probate Court, and it appears that he waived notice of the demand. There is nothing in this objection, which is raised here for the first time.

No error appearing in the record which could prejudice appellant, and warrant a reversal of the judgment of the Circuit Court in this case, it is affirmed. All the judges concur.

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APPENDIX.

BEING A STATEMENT OF POINTS DECIDED IN CASES NOT REPORTED.

Where no assignment of errors, and no statement and brief are filed by appellants, the appeal will be dismissed. *Calvin Haskell* v. *O. P. Saylor; H. Goosens, Executor, etc.*, v. *Andreas Sutter; Jacob S. Gates* v. *J. R. Hubbard.*

Where the appellant fails to file a transcript and prosecute his appeal, and the respondent files a transcript accompanied by a motion for affirmance, the motion will be sustained. *Thomas Slevin* et al. v. *John Butler* et al.; *George Ruse* v. *John V. Olehausen; F. P. Thompson* v. *Bessie Barrett.*

The Circuit Court of St. Louis has no power to grant an appeal unless the bond required by section 2, p. 17, Acts 1869, shall have been given. (*Blanchard* v. *Wolff*, 1 Mo. App. 520.) *City of St. Louis* v. *C. Borman.* Opinion by GANTT, P. J.

Under the city charter of the city of St. Louis, of 1870 (section 16, Article 8), an action upon a special tax-bill is barred two years after its issue, and, if the lapse of two years appears upon the face of the petition, the objection may be taken by demurrer. *City of St. Louis* v. *T. B. Edgar* et al. Opinion by GANTT, P. J. 2i 595 139m 301

1. The clerk of the Circuit Court, to whom fees are taxed in any case, is the only person entitled by law to receive them from the party chargeable, or from the sheriff, who has collected them on fee-bill or execution.

2. When fees are collected, they will be held by the

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clerk, to his own use, or paid into the county treasury, according to the determination of the inquiry whether he has retained to his own use from other fees, earned in the same year, the maximum sum allowed him by law for any one year.

3. The incumbent clerk has no right to fees earned by, or taxed to, his predecessor; they belong either to the latter or to the county, and the incumbent is not a trustee for the county, and has no power to administer this fund. *J. Fred. Thornton, clerk,* v. *Emile Thomas, sheriff.* Opinion by GANTT, P. J.

1. Where, in an agreement of copartnership, no special provision is made for an allowance to either partner for personal services to be rendered about the business of the firm, it is not allowable to estimate the comparative values of such services rendered by the partners respectively, in a settlement of the account between them.

2. Where distinct issues are made in the pleadings, a referee has no authority to go beyond them and report a right of recovery in either party upon a claim which neither has asserted in the record.

3. Interest cannot be added upon an account when there has been no presentation or demand of payment.

4. The objection that a referee does not appear to have been duly qualified before hearing the proofs, if not made in the trial court, will be presumed, on appeal, to be without foundation in the fact itself. *Magnus Kaiser* v. *Frederick Wilhelm.* Opinion by LEWIS, J.

A motion to retax costs, unaccompanied by a copy of the bill, or the items complained of, will be overruled. *St. Louis Domicile Savings and Loan Association* v. *Edward Augustin.* Opinion by BAKEWELL, J.

Where the lessor does not covenant to repair the demised premises, he cannot be made answerable in damages to the lessee for their being out of repair. *Michael Joyce* et al. v. *A. F. R. DeGiverville* et al. Opinion by GANTT, P. J.

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A party cannot prove a special contract for services by entries in his own book, coupled with his testimony that "he made all the entries in his business from day to day, and that, at the time he made said contract, he entered the same in said book." *C. Daum* v. *G. Neumeister*. Opinion by LEWIS, J.

Where the parties frame and go to trial upon issues directed to a particular matter of fact, which issues are found against the defendant, if the court receives other evidence not warranted by the pleadings, the tendency of which is to show that, notwithstanding the finding, the plaintiff ought not to recover, the proper course is to make an order "*quod partis replacitent*," and not to give judgment for the defendant upon such a record. *L. G. Quinlin, jr.*, et al. v. *J. P. Keiser* et al. Opinion by GANTT, P. J.

A writ of error cannot be sued out to take a cause to the Court of Appeals, where a judgment has been rendered by the general term of the St. Louis Circuit Court reversing the action of the special term. *Wm. Minot, jr., Executor*, v. *James E. Kaime*. Opinion by BAKEWELL, J.

1. It is not error to refuse to entertain exceptions to a referee's report not filed within the time prescribed by law.

2. The allowance to a referee must be manifestly excessive to warrant the interference of the appellate court. *St. Louis Democrat Company* v. *E. P. Gray*. Opinion by BAKEWELL, J.

1. The Court of Appeals will not notice points not made in the motion for a new trial.

2. The fact that counsel inadvertently overlooked the fact that depositions had been taken and filed by the other side, and in ignorance of the depositions went to trial, is no ground for granting a new trial.

3. Where a motion for a new trial is made on the ground of newly-discovered evidence, it must appear that the existence of such evidence was not known to parties or their

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counsel in time for the former trial, or that the evidence was then inaccessible. *J. L. Graves* v. *George Pegram* et al. Opinion by BAKEWELL, J.

Where there is no evidence that plaintiff ever had possession of the premises in dispute, it is error to refuse to set aside a verdict for plaintiff in a proceeding for an unlawful detainer. *A. McElhinney* v. *J. Atwell.* Opinion by BAKEWELL, J.

Where notice of appeal from a justice was by mistake served upon a person other than the appellee, but bearing the same name, and the appellee was not served: *Held,* no error to affirm the judgment at the second term for failure to prosecute the appeal. *H. W. Bodeman* v. *D. Crawford.* Opinion by BAKEWELL, J.

1. Where the plaintiff was attacked by vicious dogs belonging to defendant, who knew their dangerous character and allowed them to run at large, whereby his clothing was torn, his person injured, and parcels of goods in his possession were destroyed, the limit of damages recoverable is not the value of the property injured or destroyed. Exemplary or punitive damages may be assessed.

2. Statements of injuries to the person, and of injuries to property, resulting from the same wrongful act, are not statements of different causes of action.

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3. The defendant has no right to demand a bill of particulars in an action for a tort. *Max Von Fragstein* v. *Benedick Windler.* Opinion by LEWIS, J.

Where no testimony is preserved in a bill of exceptions, the judgment of the trial court will be affirmed. *George F. King* v. *Thomas C. Lidwell.* Opinion by LEWIS, J.

1. Where plaintiff, upon defendant's request, prepared plans and specifications for a building, and the only controversy shown by the pleadings was as to whether the work so done was conformable with defendant's directions, it was not necessary for the plaintiff to make formal proof of an actual delivery of the plans and specifications to defendant.

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2. An instruction that plaintiff could not recover without satisfactory proof that he had fully complied with his agreement, or that defendant had used or enjoyed the work done by defendant, was properly refused, under the circumstances of the case. *F. W. Raeder* v. *J. Schnaider*. Opinion by LEWIS, J.

Where one purchases real estate from another having the legal title, and without notice of any equitable title outstanding to the same, the mere fact that the purchase money was only partly paid in cash will not suffice to give the equitable owner any claim to the property as against the *bona fide* purchaser of the legal title. *Henry Digby* v. *Lewis Jones*. Opinion by BAKEWELL, J.

Where a trustee sells property in his hands without any notice to the equitable owner, and without giving the owner an opportunity to redeem, he will be held to account for the property at its highest market value. *Lewis Jones* v. *Real Estate Savings Institution* et al. Opinion by BAKEWELL, J.

It is not error to refuse to grant a new trial where judgment has been rendered by default, owing to the neglect of counsel. *C. G. Meyer* v. *Southwestern Construction Company*. Opinion by BAKEWELL, J.

1. Where there has been a sale of personalty in good faith, followed immediately by open and notorious possession by the vendor, the sale cannot be disturbed by creditors of the vendor.

2. Exclusive possession by the vendee for a year and a half is enough to satisfy the statute as to time.

3. A witness cannot be cross-examined as to irrelevant facts merely to discredit his testimony by contradictory testimony. *State, to use A. De Hatre*, v. *P. Schuchmann*. Opinion by BAKEWELL, J.

An action on a special tax-bill issued prior to March 4, 1870, not commenced within two years after March 4, 1870, is barred by section 16, Article 8, page 76, Session Acts

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1870. *City of St. Louis, to use R. D. Lancaster*, v. *D. H. Armstrong*. Opinion by GANTT, P. J.

Where the question is as to the amount of property held by a defendant in execution, it is proper for the court to permit him to show that, instead of being the sole proprietor of a particular piece of property, he is only the owner of a fractional interest in it; and to allow evidence that his interest in the property is subject to incumbrances. *State, to use William H. Henderson*, v. *P. C. Taylor* et al. Opinion by GANTT, P. J.

1. On appeal from an order of the St. Louis Circuit Court at general term, reversing the judgment of special term and remanding the cause, a bond must be given, or the appeal will be dismissed.

2. The fact that the appeal was taken to the Supreme Court, and by that court certified and transferred to the Court of Appeals, does not conclude the latter court, nor affect its jurisdiction to determine the matter. *State, to use B. N. Sternberg*, v. *Thomas Allen* et al. Opinion by BAKEWELL, J.

2d 600 132m272 2d 600 139m301 The fact that the defendant in a proceeding under section 53, Article 5, chapter 110, of Wagner's Statutes, is a municipal corporation does not exempt it from the order contemplated by that section. *M. Walser* v. *City of St. Louis*. Opinion by GANTT, P. J.

1. A contracted to build a house for B, and bought the materials therefor from C under a contract, the whole of which was furnished by C in December, 1870. Afterwards, materials were purchased by A from C for extra work. C filed a lien in June, 1871, for all the materials. *Held*, that it was too late as respects all articles furnished under the original contract.

2. A verdict will not be disturbed by an appellate court on the suggestion that it is against the weight of evidence. *Charles H. Peck* et al. v. *W. Richardson* et al. Opinion by GANTT, P. J.

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1. In St. Louis county, justices of the peace have jurisdiction of actions to recover the price of goods sold, to an amount not exceeding $200.

2. If defendant, having sold goods and chattels to plaintiff, instead of delivering, destroys them, plaintiff may waive the tort and sue for the value of the goods not delivered. *A. Deichman* v. *T. Brueggestradt.* Opinion by GANTT, P. J.

Where the pleadings upon which the cause was tried do not appear in the transcript of the record, all presumptions are in favor of the action of the trial court, and the judgment will be affirmed. *Central Savings Bank* v. *Bellefontaine Railway Company.* Opinion by LEWIS, J.

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ACCOUNTS.

Every new item in a running open account draws with all preceding items, and is a recognition of the balance due, whether the account be mutual or not. *Ring* v. *Jamison, Admr.*, 584.

ACTIONS. See ATTORNEY AND CLIENT, 486; CONTRACT, 61; DAMAGES, 105; CORPORATIONS, 187.

A suit on the account of the taking of personal property held under a deed of trust is rightly brought in the name of the trustee. *State to use* v. *Jacob*, 183.

An executor entitled to possession of real estate is a proper party to an action on a special tax-bill affecting such estate. *Prendergast* v. *Richards*, 187.

A judgment on a special tax-bill erroneously issued is not a bar to an action upon an amended and correct tax-bill for the same work. *Id.*

An action will not lie for the refusal to pay for stock, where one, acting in good faith, was induced by false representations to give his note as stock subscriber to a sham corporation, set on foot without authority of law. *Occidental Insurance Company* v. *Ganzhorn* et al., 205.

No assignment from an agent is necessary to enable the principal to sue upon a contract made for his benefit by his agent. *Turnbull* v. *Watkins*, 235.

For false return to alternative writ of *mandamus*. See MANDAMUS, 303.

Notaries public are liable to an action for damages for false certificate of acknowledgment of a deed. *State to use* v. *Meyer* et al., 413.

Right of action as between a judgment creditor and a trustee under deed of trust. See LIENS, 459.

Issues in an action for malicious prosecution. See MALICIOUS PROSECUTION, 540.

Right of action by a broker, for compensation, against one who employs him to make a purchase. *Cavender* et al. v. *Waddingham*, 551.

Action by an administrator. See ADMINISTRATION, 568.

Action to quiet title. See PRACTICE, 600.

If defendant, having sold goods and chattels to plaintiff, instead of delivering, destroys them, plaintiff may waive the tort and sue for the value of the goods not delivered. *Deichman* v. *Brueggestradt*, 601.

ADMINISTRATION. See SET-OFF, 33; EVIDENCE.

Where a claim against a partnership estate is acknowledged to be just by the surviving partners administering, and they undertake to pay it as soon as the assets will enable them, after which more than two years elapse

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ADMINISTRATION—*Continued.*
before it is presented for allowance in the Probate Court—the executor of the deceased partner having, meanwhile, succeeded to the administration of the partnership effects—it will not be barred by the statutory limitation if two years have not elapsed since the grant of letters to the executor on the partnership estate. *Denny* v. *Turner*, 52.
A distributee of an estate, though not a party to the record, may appeal from the allowance of a demand in the Probate Court. *Murphy* v. *Murphy* et al., 156.
There may be circumstances which will render something less than an absolute strict compliance with the requirements of the statutes a sufficient exhibition of a demand for allowance against the estate of deceased. *North* et al. v. *Walker*, 174.
A devisee cannot maintain ejectment against a tenant of the executor, under a leasing order of the Probate Court, while the estate remains unsettled. *Eoff* v. *Tompkins* et al., 464.
As against the devisee the testamentary dispositions of deceased are subject to the prior claims of creditors. *Id.*
Rents collected by an executor or administrator are assets of the estate. *Id.*
Where a bank held a note against a depositor, at the time of his death, which was larger in amount than the sum on deposit, and the bank presented its claim in the Probate Court and had a balance struck between the two demands, the allowance thus entered is *res adjudicata*, and conclusive against an action by the administrator to recover the money on deposit. *Knecht, Admr.*, v. *United States Savings Institution*, 563.
The credit entered by the bank of the sum deposited on its demand against the estate was not a voluntary credit, but was compulsory, under the statutory oath of the claimant. *Id.*

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION. See INSTRUCTIONS, 432.

AGENT. See PRINCIPAL AND AGENT.

APPEALS. See WRITS OF ERROR; PRACTICE, CIRCUIT COURT, 476.
A distributee of an estate, though not a party to the record, may appeal from the allowance of a demand in the Probate Court. *Murphy* v. *Murphy*, et al., 156.
When an appeal is taken from a decision of the land commissioner, it is his duty to make and certify, on demand, a transcript of his proceedings without charge. *State* ex rel. v. *Ryan*, 303.
On the authority of *Heagele* v. *Mallinckrodt*, *held*, that the title to real estate was not involved in this action on special tax-bills, and an appeal to the Supreme Court would not lie. *Skrainka* v. *Allen*, 387.
The Circuit Court of St. Louis has no power to grant an appeal unless the bond required by section 2, page 17, Acts 1869, shall have been given. *City of St. Louis* v. *Borman*, 595.
Where notice of appeal from a justice was by mistake served upon a person other than the appellee, but bearing the same name, and the appellee

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APPEALS—*Continued.*

was not served, *held*, no error to affirm the judgment at the second term for failure to prosecute the appeal. *Bodeman* v. *Crawford*, 598.

On appeal from an order of the St. Louis Circuit Court, at general term, reversing the judgment of special term and remanding the cause, a bond must be given, or the appeal will be dismissed. *State to use* v. *Allen* et al., 600.

The fact that the appeal was taken to the Supreme Court, and by that court certified and transferred to the Court of Appeals, does not conclude the latter court, nor affect its jurisdiction to determine the matter. *Id.*

APPRAISEMENT. See EXEMPTIONS.

ARBITRATION.

A submission to a majority of five arbitrators will support an award by four, where only four heard the case, when both parties were present at the hearings, and no objection was made until after the award. Such an award can be enforced by motion, under our statute. *Sweeney* v. *Vaudry* et al., 352.

Where the parties had rested their case, and the arbitrators, on notice to both sides, re-opened the matter for further testimony, this will not invalidate the award. *Id.*

Where the arbitrators were under the submission to comply with the by-laws of a certain association and violated these by-laws in not entering in a proper book a summary of the controversy and the grounds of their award, *held*, that such neglect did not invalidate the proceedings. *Id.*

ASSESS.

As applied to taxation, the words "assess" and "levy" are not synonymous. *Waterman* et al. v. *Harkness*, 494.

ASSIGNMENT. See EVIDENCE, 252; INSURANCE, 22; LEASE, 87.

No assignment from an agent is necessary to enable the principal to sue upon a contract made for his benefit by the agent. *Turnbull* v. *Watkins*, 285.

ATTORNEY AND CLIENT. See EVIDENCE, 486; CHAMPERTY.

Where an attorney is employed generally to guard his client's interests in a particular matter, and bestows labor in investigations which lead to the conclusion that his client has no real interest in the matter, he is entitled, nevertheless, to compensation for his services. *Darby* v. *Knapp*, *Exr.* 486.

Where no proof is made of the value of services rendered by an attorney, the jury may fix a reasonable value, from their own knowledge of the business and affairs of society. *Id.*

BAILEES. See COMMON CARRIERS, 369.

An acknowledgment of notice of transfer, signed in blank by the warehouseman on a warehouse receipt — the name of the transferee being omitted — will hold the signers to every responsibility as bailees of the transferee, whose name may be afterwards inserted, whether in fact known to them as such or not. *Central Savings Bank* v. *Garrison* et al., 58.

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BANKS AND BANKING. See CORPORATIONS; NOTICE, 367.

The relation existing between a bank and its depositor on current account is that of debtor and creditor. Accordingly, where a bank held a note against a depositor, at the time of his death, which was larger in amount than the sum on deposit, the bank might present its claim in the Probate Court and have a balance struck between the two demands. The allowance thus entered is *res adjudicata*, and is conclusive against an action by the administrator to recover the money on deposit. *Knecht, Admr.*, v. *United States Savings Institution*, 568.

The credit entered by the bank of the sum deposited on its demand against the estate was not a voluntary credit, but was compulsory, under the statutory oath of the claimant. *Id.*

BANKRUPTCY. See CORPORATIONS, 87; INSURANCE, 22.

An adjudication of bankruptcy will not compel a stay of proceedings, in a suit against a bankrupt in a state court, upon motion and production of the certificate of adjudication. *Howes* v. *Holmes* et al., 81.

A commission merchant occupies a fiduciary relation to his principal, so that a discharge in bankruptcy will not release him from liability upon a debt so incurred. *Brunswig* et al. v *Taylor* et al., 351.

BILLS OF EXCHANGE.

No instrument in writing, except a bill of exchange, not having the words "value received," is a negotiable instrument in Missouri. *Lowenstein* v. *Knopf*, 159.

T. accepted bills of exchange in W.'s favor, for which W., by a contemporaneous written agreement, promised to advance a certain sum to T., through the latter's agent. W. advanced only part of the money promised; but T., being induced to believe that all had been advanced to his agent, caused the bills to be paid in full. *Held*, in a suit by T. for the balance not advanced by W., and for damages, that, although fraud was charged against W. in collecting the whole amount of the bills, yet the action was based on the written contract, and was, therefore, not barred by the statutory limitation of five years. *Turnbull* v. *Watkins*, 285.

BONDS. See NOTICE, 345; TRESPASS, 329.

In an action on a penal bond, judgment may be entered for the amount of the bond, with interest from the date of suit. *St. Louis Domicile and Savings Loan Association* v. *Augustin*, 123.

An entry of judgment on the assessment of damages by a jury in a suit upon a penal bond, which is not in the proper form for such a judgment, cannot be amended by a subsequent entry of judgment. *Id.*

Where bonds are issued to G. for the purchase money of land, and he negotiates the same, he is estopped to deny their validity, and the holder is entitled to be paid therefor out of the assessed value of the land sold. *Jamison* v. *Griswold*, 150.

Bond of indemnity. See MORTGAGE, 295.

The statutory bond in a replevin proceeding is no protection to the officer against the claims of persons having no interest in the controversy. *Dowell* et al. v. *Taylor* et al., 329.

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BY-LAWS. See CORPORATIONS.

CARRIERS. See COMMON CARRIERS.

CHAMPERTY.

A contract between an attorney and client that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property as compensation for his services, there being no agreement that the attorney should advance costs or furnish money, is not void in Missouri for champerty. *Semble* that it would not be void even were an agreement to advance costs part of the contract. *Duke* et al. v. *Harper* et al., 1.

CHATTELS. See CONVEYANCE, 102; SALES; FRAUDULENT CONVEYANCES, 183.

A sale of, in the vendor's possession, implies a warranty of the title. *Dryden* et al. v. *Kellogg*, 87.

Buildings on leasehold property, which, by the condition of the lease, may be removed at the expiration of the term, may be sold and transferred as personalty. *Id.*

A purchaser of personal property is not required, before proceeding against his vendor upon the warranty of title, to wait for an actual deprivation by the true owner. He may surrender the property voluntarily, but must be then able to show conclusively that his surrender was to the paramount owner. *Id.*

What acts of a vendor will constitute a complete transfer of ownership. *Dowell* et al. v. *Taylor* et al., 329.

The purchaser's possession and ownership may be complete as against a stranger, although a subject of controversy betweeen him and his vendor. *Id.*

CLERKS OF COURTS.

The clerk of the Circuit Court, to whom fees are taxed in any case, is the only person entitled by law to receive them from the party chargeable, or from the sheriff, who has collected them on fee-bill or execution. *Thornton* v. *Thomas*, 595.

When fees are collected, they will be held by the clerk, to his own use, or paid into the county treasury, according to the determination of the inquiry whether he has retained to his own use from other fees, earned in the same year, the maximum sum allowed him by law for any one year. *Id.*

The incumbent clerk has no right to fees earned by, or taxed to, his predecessor; they belong either to the latter or to the county, and the incumbent is not a trustee for the county, and has no power to administer this fund. *Id.*

COMMON CARRIERS. See NEGLIGENCE.

All persons following the occupation of carrying goods by land or water are common carriers. *Kirby* v. *Adams Express Company*, 369.

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COMMON CARRIERS—*Continued.*

A common carrier, by special contract, can limit his liability at common law; but, notwithstanding the special contract, he remains a common carrier, with his common-law liability restricted in so far as it may be lawfully restricted by the contract. *Id.*

A clause in a contract between an express company and a shipper stated that goods shipped are of the value of $50, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than $50 unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss. *Id.*

A common carrier may, by contract, restrict his liability as an insurer, but he will not be permitted to assume the position of an ordinary bailee; the law still holds him to a higher degree of care than that required of a private carrier, and the rule as to the burden of proof still prevails. *Id.*

Where goods are to be transported by water, and, owing to the stage of the river, cannot be taken by water to their destination, the carrier is not bound to forward them overland; and, if there has been no want of diligence, is not answerable for delay if the goods finally safely arrive. *Silver* et al. v. *Hale*, 557.

Evidence as to negligence in such case. *Id.*

CONFIRMATIONS. See PUBLIC LANDS.

CONTRACT. See FRAUDULENT CONVEYANCES, 183; INSURANCE, 311; COMMON CARRIERS, 369; LEASE, 494.

Between attorney and client, when not void for champerty. *Duke* et al. v. *Harper* et al., 1.

An agreement between two keepers of places of public entertainment not to pay a bonus to any club or society, for twelve months ensuing the date of the agreement, as an inducement for the selection of any of the parks kept, by the respective parties to the agreement, for festivities, is not void as against public policy. *Koehler* v. *Feuerbacher* et al., 11.

A having purchased shares of B, an agreement that the transaction shall be considered as canceled cannot be made the foundation of an action by A against B, as for a resale of the shares to B. *Fine* v. *Hornsby*, 61.

An agreement whereby a corporation collecting the lawful fees due to certain officers is to retain part thereof, in consideration of forbearance of efforts to procure a repeal of the law by which the offices were created, is void. *Reed* et al. v. *Peper Tobacco Warehouse Company*, 82.

A contract by the executor of a deceased person that, in consideration of the payment of interest by the executor, the creditor will extend time for the payment of the debt, is valid. *North* et al. v. *Walker*, 174.

A covenant in a building contract, that the builder is to keep the building free from mechanics' liens, and so deliver it to the owner when completed, is not broken by the creation of such a lien, if it be directly due to the default of the owner, and if, when he is compelled to discharge it, he is

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CONTRACT—*Continued.*
indebted to the builder, on account of the contract, in a sum greater than that necessary to pay off the lien. *Wagner* v. *Dette* et al., 254.
Bringing suit on policy of insurance, by mortgagee, to whom the insurance was made payable, held to be a ratification of the contract. *Berthold* et al. v. *Clay Fire and Marine Insurance Company*, 311.
Courts will not relieve parties to a contract from the consequences of their neglect to perform their obligations thereunder. *Moser* v. *Phœnix Mutual Life Insurance Company*, 408.
Where, at the time of making an alleged contract, one of the parties was, by reason of the excessive use of intoxicating liquors, "in such unsound mental condition that he was wholly void of judgment and discretion," no contract, in contemplation of law, was in fact made, and evidence to that effect is admissible under the general issue. *Cavender* et al. v. *Waddingham*, 551.
When one negotiates through a real-estate broker for the purchase of a lot, the transaction, if completed, includes two contracts—one made with the vendor, and the other with the broker for his compensation. *Id.*
Ratification of contract by an infant. See INFANTS, 584.

CONSTABLES. See DAMAGES, 295.
Where an execution debtor selects property to hold exempt from execution, and it is not valued, on appraisement, at over $300, the constable must release it. He cannot proceed to sell property so claimed until it has been appraised. *State to use* v. *Kurtzeborn*, 335.

CONSTITUTIONAL LAW.
An act of legislature recognizing the existence of a corporation organized under doubtful authority places the existence of the corporation beyond question; and such an act is not retrospective in operation. *St. Louis Railroad Company* v. *Northwestern St. Louis Railway Company*, 69.
The constitutional amendment adopted in November, 1870, did not have the effect of impairing an obligation incurred by a stockholder prior to that date. *St. Louis Railway Supplies Company* v. *Harbin*, 184.

CONVEYANCE.
Of personal property, absolute on its face, may be a mortgage as between the parties; but, as to creditors of the grantor, there must be a change of possession to make it effectual for any purpose. *State to use* v. *Bell* et al., 102.
A conveyance of a reversionary interest will not be set aside by a court of equity on the ground of inadequacy of consideration, when. *Jaeschke* v. *Reinders*, 212.
In an action on covenant it is sufficient if the words used in the petition, either in their expressed intent or by necessary implication, show that a breach has been committed. *Stone* v. *Wendover, Admr.*, 247.
In case of a sheriff's deed seventy years old, though the record of the deed does not show a seal, yet, where the deed has been followed by undisputed possession, a seal will be presumed. *Dingee* v. *Kearney* et al., 515.

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CORPORATIONS.

Shares of stock in a corporation are goods, wares, and merchandise, within the meaning of the statute of frauds. *Fine* v. *Hornsby*, 61.

A legislative act recognizing the existence of a corporation, the corporate existence of which was disputed, places the existence of the corporation beyond question. *St. Louis Railroad Company* v. *Northwestern St. Louis Railway Company*, 69.

A liability upon breach of warranty is a "debt" within the meaning of the statute which provides for suits against stockholders in the event of dissolution of a corporation. *Dryden* et al. v. *Kellogg*, 87.

A contract liability which may be sued upon at any time is not a "debt which is not to be paid within one year from the time the debt is contracted," within the meaning of the statute above mentioned. *Id.*

The requirement that, in order to hold a stockholder liable, suit must be brought against the corporation within one year after the debt shall become due, has no application where the corporation has become bankrupt before the expiration of the year. *Id.*

An unreasonable by-law of a corporation is void. *State* ex rel. v. *Union Merchants' Exchange*, 96.

A by-law will not be declared void for unreasonablness unless that conclusion is perfectly clear. *Id.*

A by-law of the Union Merchants' Exchange which compels members to submit their business controversies to arbitration, on pain of suspension or expulsion, is unreasonable and void. *Id.*

Neither would a legislative grant, in the charter, of permission to make such a by-law avail. *Id.*

Neglect to choose officers of a private moneyed corporation does not work a dissolution of the corporation. The acts of the officers holding over are valid. *St. Louis Domicile and Savings Loan Association* v. *Augustin*, 123.

Authority of a coporation to make an usurious contract under its charter. *Id.*

Where a committee of a corporation are authorized, by a resolution of the directors, to make collections due the corporation, they may institute proceedings to collect, in the name of the corporation, against an individual, without an order specifying the mode of collecting that particular indebtedness, or without any more particular authority with reference thereto. *Id.*

From July 4, 1865, to November 1, 1870, no corporation could be created in Missouri, the stockholders of which were not liable for the debts of the corporation so far as those debts did not exceed the full par value of the stock by them respectively held. *St. Louis Railway Supplies Manufacturing Company* v. *Harbin*, 134.

The constitutional amendment adopted in November, 1870, did not have the effect of impairing an obligation incurred by a stockholder prior to that date. *Id.*

Subscribers to the capital stock of a corporation *held* not liable to pay for the same, because the representations which induced the subscription were false. *Occidental Insurance Company* v. *Ganzhorn*, 205.

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CORPORATIONS—*Continued.*

B. subscribed to the stock of a joint stock company, on condition that the capital stock should be $150,000; no calls to be made until $100,000 had been subscribed. *Held,* that he was liable to a call when $100,000 had been subscribed, the company having organized under a certificate fixing the capital stock at $150,000. *St. Charles Manufacturing Company* v. *Britton*, 290.

One having, by mistake, signed an alphabetical list of subscribers to the company instead of the stock-subscription book of the company, who afterwards votes as a stockholder, is estopped to deny his subscription to the stock of the company. *Id.*

The general powers of a manufacturing corporation give it no authority to indorse accommodation paper; but the fact that such a company appears as indorser of paper of which it is not payee does not tend to show that such an indorsement is for the accommodation of others, nor is it a circumstance to put those purchasing such paper on inquiry. *Lafayette Savings Bank* v. *St. Louis Stoneware Company*, 299.

The burden to show that such paper was taken with notice that the company had no authority to indorse the same lies on the defendants in a suit on the note. *Id.*

A creditor of a corporation, created in 1867, obtained judgment in 1870 against the corporation, and, on the return of *nulla bona* to an execution, prayed separate executions against the shareholders. *Held,* that the creditor was entitled to execution against each shareholder for the amount of his subscription remaining unpaid, and 100 per cent. on the original subscription. 2. That the failure of the corporation to complete the work for which the corporation was established, within a period named by its agent when soliciting subscriptions (such completion not being made a condition of the subscription, and the shareholder by not paying his subscription having retarded the work), does not discharge the shareholder from liability to pay his subscription, nor from his obligation to satisfy the claims of its creditors. *Pickering to use* v. *Templeton* et al., 424.

The delivery by a corporation to its shareholders of certificates of paid-up stock, when only part of the par value has been paid, will not prevent a creditor of the corporation from showing the fact, and having execution against such shareholder. *Id.*

The failure of the agent of a corporation to deliver to the corporation the original subscription paper will not discharge those who had signed that paper. *Id.*

A subscriber to the stock of a company cannot plead, in avoidance of his liability thereon, that he merely signed at the request of the solicitor for the company, as an inducement for others to subscribe. *Id.*

COURTS. See Practice.

COVENANTS. See Conveyances, 247; Evidence, 254.

CRIMINAL LAW.

Libel is a criminal offense, and a corporation may be the subject of a criminal libel. *Brennan* v. *Tracy*, 540.

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DAMAGES.

Which give merely a full, round compensation for the injury done, are not punitive. *Eckert* v. *St. Louis Transfer Company,* 36.

Action for damages sustained by an employee, in consequence of failure by his employer, the defendant, proprietor of a brewery, to provide sufficient guards and appliances for the prevention of accidents on the premises—form and substance of instructions on both sides approved, as in harmony with former decisions in this state and elsewhere. *Steiner* v. *Moran,* 47.

Measure of, upon breach of warranty of title, is the amount of the purchase money with interest, and expenses necessarily incurred in defending the failing title. *Dryden* et al. v. *Kellogg,* 87.

In an action to recover damages for the institution of proceedings to condemn private property for public use, money need not have been actually paid out to entitle plaintiff to recover; but, if a debt has been created by reason of such proceedings, a damage has been incurred for which an action will lie. *Leisse* et al. v. *St. Louis & Iron Mountain Railroad,* 105.

And when the proceedings are abandoned because the price assessed by inquest is unsatisfactory, the corporation exercising the right of eminent domain will be liable to the owner for all damages occasioned by the proceeding. *Id.*

Where property against which proceedings to condemn for public use belonged to A and B, co-tenants, who, in resisting the proceedings, employed different counsel, who severally attended to the management of the cause, *held,* that it was error to permit them to sue jointly to recover damages for counsel fees, etc. *Id.*

What proof may be made in reduction of damages. *Wagner* v. *Detts* et al., 254.

The plaintiff in a suit on a penal bond cannot recover more in damages than the loss actually suffered. No loss or damage accrues to him from compelled payments, when such payments operate to discharge, *pro tanto,* other liabilities assumed by him in the same contract. *Id.*

A constable having sold mortgaged property under execution, and paid the proceeds to the mortgagee, it was erroneous to exclude evidence of such payment, for the defense, in an action by the mortgagee for damages resulting from the seizure and sale. *State to use* v. *Nauert* et al., 295.

Respondent made return to an alternative writ of *mandamus;* the relator did not traverse nor plead to the facts alleged in the return, but demurred; the return was declared insufficient in law, and the demurrer sustained. *Held,* that there was no foundation for an action for false return, and damages could not be assessed upon motion. *State* ex rel. v. *Ryan,* 303.

Where a trespass has been willfully committed, and persisted in after earnest remonstrance, with circumstances of aggravation, it is not error to instruct the jury that they are at liberty to give exemplary damages. *Newman* v. *St. Louis & Iron Mountain Railroad Company,* 402.

A notary public who falsely certifies that he is personally acquainted with the grantor in a deed, whom he does not know, and who is personated by another, is liable to all persons damaged by such false certificate. *State to use* v. *Meyer* et al. 413.

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DAMAGES—*Continued.*

In an action for damages for such a false certificate, it will not avail anything for the notary to say he was not aware of its falsity, or that he believed it to be true. It is his duty to know it to be true. *Id.*

A verdict for damages which is demonstrably excessive will be set aside. *Carr* v. *Hibernia Insurance Company*, 466.

Liability of a municipal corporation for injuries resulting from the dangerous condition of a street or sidewalk. See MUNICIPAL CORPORATIONS, 571.

A lessor who has not covenanted to repair cannot be made answerable in damages because the leased premises are out of repair. *Joyce* et al. v. *DeGiverville* et al., 596.

Where the plaintiff was attacked by vicious dogs belonging to defendant, who knew their dangerous character and allowed them to run at large, whereby his clothing was torn, his person injured, and parcels of goods in his possession were destroyed, the limit of damages recoverable is not the value of the property injured or destroyed. Exemplary or punitive damages may be assessed. *Von Fragstein* v. *Windler*, 598.

DEBTOR AND CREDITOR. See SALES, 599.

Where the debtor does not direct the application of a payment, the creditor may apply it as he thinks proper, provided such application is not inequitable. He is not bound to apply it in the way most beneficial to the debtor. *Shortridge* v. *Pardee*, 368.

This application of payment may be made by the debtor at any time before suit, where the debtor made no application at the time of the payment. *Id.*

Rights of execution creditors of a corporation to separate executions against the shareholders on the return of *nulla bona* to an execution against the corporation. *Pickering to use* v. *Templeton* et al., 424.

As against the devisee the testamentary dispositions of deceased are subject to the prior claims of creditors. *Eoff* v. *Tompkins* et al., 464.

The relation existing between a bank and its depositor on current account is that of debtor and creditor. See BANKS AND BANKING, 563.

DEDICATION.

A. filed a plat dedicating to public use the streets shown thereon, so far as they were on his own land. He subsequently acquired that part of the land shown on the plat which belonged to others when the plat was filed, and thereafter returned for taxation so much of it as was not in the streets shown in the plat, describing it as bounded by these streets, and in such manner as to render his description unintelligible except by reference to this plat. *Held*, that this was evidence tending to show a dedication good on general legal principles. *Skrainka* v. *Allen*, 387.

DEMURRER. See PRACTICE, 595.

DEPOSITION.

When a motion to suppress or exclude is properly overruled. *Cator* et al. v. *Collins* et al., 225.

DESCENTS AND DISTRIBUTIONS. See EQUITY, 212.

A cohabited with B, and a child, C, was born of this intercourse. He subsequently married D, to whom a child was born, who survived D, but died

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DESCENTS AND DISTRIBUTIONS—*Continued.*
in infancy. Afterwards A resumed his intercourse with B, living with her until his death, acknowledging the child, C, as his, but no marriage ceremony of any kind took place between them at any time. D died seized of real estate, and the descendants of C claimed it as the heirs of A, alleging that A inherited it from his deceased child by D. *Held,* 1. That C was a bastard child of A. 2. That nothing was done which legitimized C. 3. That the descendants of C could not claim title as the heirs of A. *Dyer* et al. v. *Brannock* et al., 432.

DEVISEE. See EXECUTORS AND ADMINISTRATORS; WILLS.

DIVORCE. See EVIDENCE, 17, 486.

EJECTMENT.
Cannot be maintained by a devisee against a tenant of the executor, under a leasing order of the Probate Court, while the estate remains unsettled. *Eoff* v. *Tompkins* et al., 464.

EMINENT DOMAIN.
The right of eminent domain resides in the State, and may be enforced, not only in behalf of the State, but of any artificial person clothed with a franchise the enjoyment of which promotes a public use. *Leisse* et al. v. *St. Louis & Iron Mountain Railroad Company,* 105.
The basis of the enforcement of the right of eminent domain is the necessity for the public use of the property the taking of which is sought. *Id.*
If a corporation institute proceedings to condemn property to public use, and the value is ascertained by inquest, and the proceedings are abandoned because the price is unsatisfactory, such corporation will be liable for damages occasioned by such proceedings. *Id.*

EQUITY. See SALES.
When a court of equity will not set aside a conveyance of a reversionary interest on the ground of inadequacy of consideration. *Jaeschke* v. *Reinders,* 212.
The ground upon which courts of equity extend protection in case of a sale by expectant heirs and reversioners. *Id.*
One who takes negotiable paper before maturity, as security for an antecedent debt, holds it subject to the equities between the original parties. *Brainard* et al. v. *Reavis* et al., 490.

ESTOPPEL.
One to whom a bond is made payable, and who has negotiated the same, is estopped to deny the validity of the bond as against himself. *Jamison* v. *Griswold,* 150.
One having, by mistake, signed an alphabetical list of subscribers to the company instead of the stock-subscription book of the company, who afterwards votes as a stockholder, is estopped to deny his subscription to the stock of the company. See CORPORATIONS, 290.
Where part only of certain mortgaged property is taken in execution against the mortgagor, and the mortgagee gives notice of his claim, stating the value of all the property, whereupon the officer takes an indemnifying

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ESTOPPEL—*Continued.*
bond, reciting the value according to the notice, the obligors in the bond are not estopped by such recital, but may show that the property taken was of less value. *State to use* v. *Nauert* et al., 295.

What action of an insurance agent will work an estoppel on the company. See INSURANCE, 466.

EVIDENCE. See FRAUDULENT CONVEYANCES, 241; PLEADING, 247; PRACTICE, 235.

Ebling and Able are not *idem sonans*, and it is error to admit evidence of a judgment against John Able in a proceeding to revive a judgment against John Ebling. *Weber* v. *Ebling*, 15.

It is not competent, in a divorce suit, to show the general reputation of the husband or wife for good temper, or the reverse. *Dwyer* v. *Dwyer*, 17.

By JUDGE BAKEWELL.—Nor is it competent for the husband or wife to testify to private conversations held between themselves. *Id.*

What memorandum, made on the day of sale by sheriff, acting as trustee under a deed of trust, is evidence tending to show a contract of sale, in proceeding to charge party named in memorandum. *Barclay* et al. v. *Bates*, 139.

A balance found in favor of a guardian, on settlement made by him in the Probate Court, after the death of his ward, without the notice required by law for final settlement, is not conclusive evidence in favor of the guardian in a suit to establish this balance against the estate of his ward. *Murphy* v. *Murphy* et al., 156.

When evidence of former transactions by an agent, similar to the one in controversy, are admissible as tending to show the extent of the agent's authority. *Morse* v. *Diebold* et al., 163.

A letter written by the principal, declaring that the agent was invested with certain powers, is proper evidence against the principal to that effect, although not addressed to the adverse party in the cause. *Id.*

The better method of proving the value of personal property is by the statements of competent witnesses, who can tell what it ought to bring in the market. But, if such testimony be not at hand, proof of a public sale of the property, actually made under legal procedure, may be admitted for the purpose. *State to use* v. *Jacob*, 183.

The testimony of experts as to the signature of K. to a paper is evidence from which the jury may determine whether the paper was executed by K. *Kempf* v. *Zeppenfeld*, 195.

An instruction that, where defendant alleged a settlement, the burden is upon him of proving such settlement by a preponderance of testimony is not erroneous. *Id.*

A receipt in full, executed by plaintiff, is *prima facie* evidence of a settlement and payment in full. *Id.*

Though one found in possession of real estate by the owner, who has given a written lease to a third party, is *prima facie* liable as assignee of the lease, yet it is always open to him to prove the character of his tenancy, and that he is not in fact assignee of the lease. *Ebling* v. *Fuylein*, 252.

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EVIDENCE—*Continued.*

In an action by the owner against the builder, for breach of covenant to keep the building free from liens, the defendant is entitled to prove, in reduction of damages, the amount due to him on the contract, from the plaintiff, at the time when the latter paid off the liens complained of, and at the commencement of the suit. *Wagner* v. *Dette* et al., 254.

The payee and holder of a note, indorsed in full to a third party, is not on that account obliged to prove ownership of the note. *Wickersham* v. *Jarvis* et al., 279.

Where one who has authority to sign and indorse mercantile paper for another, without authority makes or indorses paper for the accommodation of a third party, the fact that the agent's name appears as last indorser is a circumstance strongly indicating that the paper was made for his own benefit, and that the proceeds go to him. *Edwards* et al. v. *Thomas* et al., 282.

A constable having sold mortgaged property under execution, and paid the proceeds to the mortgagee, it was erroneous to exclude evidence of such payment, for the defense, in an action by the mortgagee for damages resulting from the seizure and sale. *State to use* v. *Nauert* et al., 295.

Burden of proof as to notice of the authority of a manufacturing corporation to indorse accommodation paper. Indorsement, by such corporation, of paper of which it is not the payee does not tend to show that it was for the accommodation of others, and is not a circumstance to put a purchaser upon inquiry. *Lafayette Savings Bank* v. *St. Louis Stoneware Company*, 299.

Effect given by Court of Appeals to preponderance of evidence in chancery cases. *Keane* v. *Kyne*, 317.

Under what circumstances a replevin suit by the purchaser is no evidence to disprove his possession and ownership, in favor of a seizure under replevin by a third party against the vendor. *Dowell* et al. v. *Taylor* et al., 329.

A contract between a common carrier and a shipper, restricting the carrier's liability, does not shift the burden of proof as to negligence. *Kirby* et al. v. *Adams Express Company*, 369.

What is evidence tending to show a dedication of land for a public street. See DEDICATION, 387.

The delivery by a corporation to its shareholders of certificates of paid-up stock, when only part of the par value has been paid, will not prevent a creditor of the corporation from showing the fact, and having execution against such shareholder. *Pickering to use* v. *Templeton* et al., 424.

Evidence may be introduced to show that the date of a judgment is erroneously entered on the docket of a justice of the peace. *Raum* v. *Eyermann*, 476.

When a special tax-bill cannot be used as evidence. *Carroll* v. *Eaton*, 479.

In an action by an attorney, for services in defending a husband in a divorce and alimony suit, it is error to reject testimony offered by plaintiff to show the property and financial condition of his client. Such rejection is not justified by the fact that there was testimony tending to prove a special contract between the attorney and client. *Darby* v. *Knapp, Exr.*, 486.

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EVIDENCE—*Continued.*

As to warranty. See PLEADINGS, 499.

In case of proceeding in the General Court of St. Louis, of date 1806, everything found in the office of the clerk, with the papers, and manifestly relating to the case, is a part of it; and all such papers and entries purporting to prove the record of the cause, though not signed by the presiding judge, are admissible to prove what was done during its progress. *Dinges* v. *Kearney* et al., 515.

In an action for malicious prosecution, it is not error to refuse testimony offered to show the plaintiff's intent in committing the acts alleged against him. *Brennan* v. *Tracy*, 540.

In an action for malicious prosecution, it is not error to reject proofs of the plaintiff's good reputation when his character has not been assailed in the trial. *Id.*

Evidence that, at the time the alleged contract was made, one of the parties, by reason of the excessive use of intoxicating liquors, was "in such unsound mental condition that he was wholly void of judgment and discretion," is admissible under the general issue. *Cavender* et al. v. *Waddingham*, 551.

When goods are to be transported by water, and, owing to the stage of water, were delayed, evidence that no boats arrived at the point of destination of the goods during the season is competent, as tending to show that the default was not occasioned by the negligence of the carrier. *Silver* et al. v. *Hale*, 557.

A party may testify in his own behalf as to matter not directly relating to the contract in issue, even though the other party to the contract be dead. *Ring* v. *Jamison, Admr.*, 584.

A party cannot prove a special contract for services by entries in his own book, coupled with his testimony that "he made all the entries in his business from day to day, and that, at the time he made said contract, he entered the same in said book." *Daum* v. *Neumeister*, 597.

Where plaintiff, upon defendant's request, prepared plans and specifications for a building, and the only controversy shown by the pleadings was as to whether the work so done was conformable with defendant's directions, it was not necessary for the plaintiff to make formal proof of an actual delivery of the plans and specifications to defendant. *Raeder* v. *Schnaider*, 599.

Where the question is as to the amount of property held by a defendant in execution, it is proper for the court to permit him to show that, instead of being the sole proprietor of a particular piece of property, he is only the owner of a fractional interest in it; and to allow evidence that his interest in the property is subject to incumbrances. *State to use* v. *Taylor* et al., 600.

EXECUTION. See FRAUDULENT CONVEYANCES, 241; EXEMPTIONS; EVIDENCE, 295.

Where E. has knowingly allowed judgment to be rendered against him by the name of A., an execution on such judgment can be made effectual against any property he may have subject to execution. *Weber* v. *Ebling*, 15.

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EXECUTION—*Continued.*

Rights of execution creditors of a corporation to separate executions against the shareholders on the return of *nulla bona* to an execution against the corporation. *Pickering to use* v. *Templeton* et al., 424.

EXECUTORS AND ADMINISTRATORS. See ADMINISTRATION.

An executor of a deceased person may, especially with the sanction of the Probate Court, make a valid contract for an extension of the time of payment of a debt owing by decedent. *North* et al. v. *Walker*, 174.

An executor entitled to possession of real estate is a proper party to an action on a special tax-bill affecting such estate. *Prendergast* v. *Richards*, 187.

A and B were co-executors of C. Money came into the hands of A, which he temporarily committed to B, taking his note, by which B promised to pay the amount to A, with interest. *Held*, that in a suit on the note it was no defense that the money belonged to the estate of C. *Cocker* v. *Cocker*, 451.

A devisee cannot maintain ejectment against a tenant of the executor, under a leasing order of the Probate Court, while the estate remains unsettled. *Eoff* v. *Tompkins* et al., 464.

Rents collected by an executor or administrator are assets of the estate. *Id.*

In a suit against an administrator, where the administrator himself is present defending during the trial, and waived notice of demand in the Probate Court, it is too late after verdict to object that no formal proof that he was administrator was made. *Ring* v. *Jamison, Admr.*, 584.

EXEMPTIONS.

The execution debtor, if the head of a family, has the right to select what property he will hold exempt from execution, over and above apparel and household furniture to the value of $100; and, if the property so selected is not valued on appraisement at over $300, it is the duty of the constable to release it. The constable cannot proceed to sell property so claimed until he has had it appraised. *State to use* v. *Kurtzeborn*, 335.

FACTORS AND BROKERS.

A commission merchant occupies a fiduciary relation to his principal, so that a discharge in bankruptcy will not, under section 33 of the United States bankruptcy act of 1867, release him from liability upon a debt so incurred. *Brunswig* et al. v. *Taylor* et al., 351.

When one negotiates through a real estate broker for the purchase of a lot, the transaction, if completed, includes two contracts: one made with the vendor, and another with the broker for his compensation. A suit by the broker is not an attempt to enforce a contract made by defendant with a third party. *Cavender* et al. v. *Waddingham*, 551.

W. employed C. & R. to purchase a lot for him upon certain terms, stipulating that the compensation of the latter was to be deducted from the purchase money going to the vendor, and was in no event to be paid by W. *Held*, that W. would be liable, nevertheless, to C. & R. for their proper fees, in case of the violation of the contract by W. in refusing to take the property. *Id.*

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FALSE CERTIFICATE. See DAMAGES, 413.

FALSE REPRESENTATIONS. See CORPORATIONS, 205.

FORFEITURE. See INSURANCE, 262.

FRAUD.

An intent to hinder, delay, or defraud creditors is sufficient to invalidate a mortgage. *State to use* v. *Nauert* et al., 295.

FRAUDS, STATUTE OF.

Shares of stock in a corporation are goods, wares, and merchandise, within meaning of the statute, so as to require a memorandum in writing to validate a sale. *Fine* v. *Hornsby*, 61.

A memorandum by the sheriff, acting as trustee under a deed of trust, made on the day of, and shortly after, the sale, if otherwise sufficient, will satisfy the statute of frauds. *Barclay* et al. *Bates*, 189.

FRAUDULENT CONVEYANCES.

A conveyance which is not invalid on account of fraudulent intent of the parties to hinder or delay creditors, may yet be so because made to the use of the grantor. Hence, it is error to instruct a jury that, if no such fraudulent intent exist, a deed is not void, as being made to the use of the grantor. *State to use* v. *Jacob*, 183.

A parol agreement between the parties, contemporaneous with the execution of a trust deed or mortgage of merchandise, that the grantor may retain the stock and continue to sell in the course of trade, will vitiate the deed, as being made to the use of the grantor, with like effect as if such agreement appeared on the face of the instrument. *Id.*

A deed is fraudulent and void as to creditors, and will be presumed to have been contrived with that intent, if by its terms the property is left in the hands of the grantor with power of sale. *Cator* et al. v. *Collins* et al., 225.

The interest of an execution debtor, in real estate which he has attempted fraudulently to convey, is salable under execution, and, where the deed is found fraudulent and void, the plaintiff in a proceeding to set the same aside and vest title in him, as purchaser at execution sale, is entitled, on proof of these facts, to an absolute decree vesting defendant's title to the premises in him. *Kinealy* v. *Macklin* et al., 241.

The rule that a grantor in a fraudulent deed can have no relief against the effect of his own conveyance has no application to a conveyance made without any fraudulent design, and because of a misapprehension by the grantor concerning his legal rights. *Keane* v. *Kyne*, 319.

GUARDIAN AND WARD. See EVIDENCE, 156.

HEIRS.

When a court of equity will extend protraction in case of a sale by expectant heirs and reversioners. *Jaeschke* v. *Reinders*, 212.

HIGHWAYS.

Action for damages for defects in. See STREETS, 571.

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HUSBAND AND WIFE.

What is competent evidence as between husband and wife in a suit for divorce. *Dwyer* v. *Dwyer*, 17.

A marriage ceremony is necessary to the relation of husband and wife. Cohabitation between a man and woman, and an acknowledgment by the man that a child born of such intercourse is his child, does not legitimate the child. *Dyer* et al. v. *Brannock* et. al., 432.

INFANTS. See HEIRS.

The contract of an infant may be ratified by an oral promise made after he comes of age, to pay the debt. *Ring* v. *Jamison, Admr*, 584.

It is not necessary that the person ratifying his contract, made as an infant, should know that he is not legally bound at the time he makes the new promise. *Id.*

INSTRUCTIONS. See FRAUDULENT CONVEYANCES, 183.

In an action for damages, instructions for defendant, to the effect that, if plaintiff knew of the opening through which he fell, and that it was carelessly kept, and yet continued to work on the premises, he did so at his own risk, and could not recover, are properly refused. *Steiner* v. *Moran*, 47.

The court cannot declare in an instruction what articles were sold, or not sold, at a public sale. *State to use* v. *Jacob*, 183.

An instruction that, where defendant alleged a settlement, the burden is upon him of proving such settlement by a preponderance of testimony is not erroneous. *Kempf* v. *Zeppenfeld*, 195.

Where the defendant was induced by false representations to subscribe to the capital stock of a corporation, *held*, that, in an action to recover the price of such stock, it was not error to instruct that plaintiff could not recover. *Occidental Life Insurance Company* v. *Ganzhorn*, 205.

It is error to instruct that, in order to render a mortgage void, there must have been an intent to "hinder, delay, *and* defraud creditors." The word "or" should be used instead of "and." Such error is not cured by another instruction to the effect that an intent to "hinder and delay" will suffice. *State to use v. Nauert* et al., 295.

As to exemplary damages for trespass. See DAMAGES, 402.

It is not error to refuse to instruct the jury, where there have been no facts proved to which the instruction asked could apply. *State to use* v. *Meyer* et al., 413.

It is error to instruct a jury as to the effect of adverse possession without also instructing them as to what constitutes adverse possession. *Dyer* et al. v. *Brannock* et al., 432.

Although the court may properly inform the jury whether certain facts do or do not constitute probable cause for a prosecution, yet an instruction offered which states the facts partially, omitting some which should be considered in connection with those stated, and declaring that the facts stated do not amount to probable cause, is properly refused. *Brennan* v. *Tracy*, 540.

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INSTRUCTIONS—*Continued.*

An instruction that plaintiff could not recover without satisfactory proof that he had fully complied with his agreement, or that defendant had used or enjoyed the work done by defendant, was properly refused, under the circumstances of the case. *Raeder* v. *Schnaider*, 599.

INSURANCE.

Freight is insurable and recoverable while the goods are so situated as to create a well-grounded expectation of freight. *Stillwell* et al. v. *Commercial Insurance Company*, 22.

Where a marine insurance is "against a total loss of any part of said boat or barge's freight at and from St. Louis to New Orleans," the policy covers freight contracted for and to be shipped on the way, as well as that on board when the vessel leaves port. *Id.*

Where the insurance was against total loss of freight of a boat and barge, and the barge was lost and her cargo transferred to the boat, and freight earned upon it, *held*, that this fact did not prevent a recovery for the loss of freight which would have been earned but for the destruction of the barge. *Id.*

Where some of the plaintiffs became bankrupt after the commencement of the suit, and before judgment, the fact that the assignee was not made a party is no ground for reversing the judgment. *Id.*

Where an insurance company has so dealt with the insured as to induce a belief that the clause of forfeiture for non-payment of interest on a premium note will not be insisted upon, there will be no forfeiture if payment be tendered within a reasonable time. *Bergman* v. *St. Louis Life Insurance Company*, 262.

But, where no tender of the interest is made for three months, and the insured dies without having made a tender, the clause of the forfeiture will be enforced. *Id.*

If one having an interest in mortgaged property procure insurance in his own name, loss, if any, payable to the mortgagee, a suit may be maintained in the name of the mortgagee. Bringing the action is a ratification of the contract, and the mortgagee is entitled to recover the full amount of insurance, not to exceed the amount secured by the mortgage. *Berthold* et al. v. *Clay Fire and Marine Insurance Company*, 311.

A local agent of an insurance company, empowered to take risks and receive premiums, has a general authority to dispense with conditions in policies issued through his agency, in the absence of any limitation upon such authority, known to the other party. GANTT, P. J., dissenting. *Schmidt* v. *Charter Oak Life Insurance Company*, 339.

What acts of the agent of the insurer will constitute a waiver of a forfeiture of one of the conditions of the policy. *Id.*

Inconsistent or contradictory conditions in a policy of insurance. *Moser* v. *Phœnix Mutual Life Insurance Company*, 408; affirming *Russum* v. *St. Louis Mutual Life Insurance Company*, 1 Mo. App. 228.

Property insured was described as being in a two-story brick building, No. 1444 Broadway. The front part of the building was two stories high, and

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INSURANCE—*Continued.*

the rear one story only. The property was partly in the front and partly in the rear part of the building. A fire originated and destroyed the property in the rear. *Held*, that there was no misdescription of the *situs* of the property. *Carr* v. *Hibernia Insurance Company*, 466.

The insurance policy issued by defendant contained a provision that the policy should be void if the assured had any other insurance, and did not notify defendant thereof and have the fact indorsed on the policy. The assured had other insurance, no such indorsement being made; but the defendant's agent knew of the fact, conferred with the agent of the other insurer, before the issue of the policy, as to the proportions of risk each should take; the risk was divided, and the policies made out according to the result of the conference. *Held*, that the defendant was estopped to object to the want of a formal notice and indorsement. *Id.*

INTEREST. See JUDGMENT, 123; USURY; LIMITATIONS, 451; PRACTICE, 235.

Interest cannot be added upon an account when there has been no presentation or demand of payment. *Kaiser* v. *Wilhelm*, 596.

JUDGMENT. See LIEN, 118; PRESUMPTION, 515.

A judgment cannot be revived against E. by showing that judgment was rendered against him under the name of A.; but, if he has knowingly allowed judgment to be rendered against him by the name of A., an execution on that judgment can be made effectual against any property he may have subject to execution. *Weber* v. *Ebling*, 15.

In an action on a penal bond, judgment may be entered for the amount of the bond, with interest from the date of suit. *St. Louis Domicile and Savings Loan Association* v. *Augustin*, 123.

A judgment rendered upon a special tax-bill erroneously issued is not a bar to an action upon an amended and correct bill for the same work. *Prendergast* v. *Richards*, 187.

A personal judgment cannot be entered against any one on a special tax-bill. *Id.*

Evidence may be introduced to show that the date of a judgment is erroneously entered on the docket of a justice of the peace. *Raum* v. *Eyermann*, 476.

If A, B, and C are sued by D, and a jury sworn to try the issues as to them all, a verdict finding the issues against A and B only, and saying nothing as to C, should not be received; and a judgment rendered upon such a verdict will be reversed. *Schweickhardt* v. *City of St. Louis* et al., 571.

When the city of St. Louis and an individual are sued jointly for damages occasioned by the negligence of the latter, and the suit is dismissed as to the individual, the record not showing that he is dead, a judgment taken thereafter against the city will be reversed. *Id.*

Will be affirmed when notice of appeal is not given. *Bodeman* v. *Crawford*, 598.

JUDGMENT BY CONFESSION.

A statement filed in the Circuit Court, which declares that A had made and delivered his negotiable promissory note, promising to pay to the cognizor,

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JUDGMENT BY CONFESSION—*Continued.*
six months after date, $8,750, for value received, etc., which was indorsed by the cognizor and B, C, D, and E, and then held by F, and which was protested for non-payment, and was due and unpaid, is not sufficient, under sections 21, 22, Article 11, Wagner's Statutes, 1055, to warrant the court in rendering judgment against the cognizor by confession. *McHenry* v. *Shephard* et al., 378.
What other statements are necessary. *Id.*

JURISDICTION.
Of justices of the peace under the "Landlords and Tenants" act. *January* v. *Stephenson*, 266.

JURY.
Where a full panel of eighteen jurors was called, where only one juror is challenged by one of the parties, even though the court improperly refused to challenge for cause, no prejudice can arise to the party challenging, and the appellate court will not interfere. *Eckert* v. *St. Louis Transfer Company*, 36.
Where a juror is objected to as prejudiced, and qualifies himself under the statute and is accepted by the judge presiding on the trial, this court will not interfere. *Id.*
The finding of a jury is conclusive when the testimony on opposite sides of a material issue is flatly contradictory. *Morse* v. *Diebold* et al., 163.
If the plaintiff prove the services on account of which he sues, but introduces no proof of their value, the jury may, from their own knowledge of the business and affairs of society, fix a reasonable value, and find a verdict in his favor accordingly. *Darby* v. *Knapp, Exr.*, 486.

JUSTICES OF THE PEACE.
The jurisdiction of a justice of the peace, for the purpose of restoring possession to the landlord, covers all cases of rent in arrear, without reference to the amount claimed. But the additional power to render judgment for the sum due from the tenant is limited by the general law regulating the jurisdiction of justices of the peace in suits for the recovery of money. *January* v. *Stephenson*, 266.
Evidence may be introduced to show that the date of a judgment is erroneously entered on the docket of a justice of the peace. *Raum* v. *Eyermann*, 476.
Appeals from should not be dismissed, when. *Id.*
When judgment of the justice will be affirmed in the Circuit Court. *Bodeman* v. *Crawford*, 598.
In St. Louis county justices of the peace have jurisdiction of actions to recover the price of goods sold, to an amount not exceeding $200. *Deischman* v. *Brueggestradt*, 601.

LANDLORD AND TENANT.
An agent of the owner cannot be proceeded against, under a municipal ordinance, for failure to remove a nuisance from premises occupied by a tenant. *City of St. Louis* v. *Kaime*, 66.

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LANDLORD AND TENANT—*Continued.*

The tenant's possession and control of leased premises are inviolable by the landlord or his agent, except for purposes pertaining to the preservation of the freehold. *Id.*

A landlord's right to evict a non-paying tenant, under the "Landlords and Tenants" act (Wag. Stat. 877), will not be affected by the fact that the lease is held by a trustee for another. The landlord has no concern with the condition of the trust, and no occasion for equitable inquiry into it. The trusteeship merely serves to describe the person with whom he has contracted. *January* v. *Stephenson*, 266.

Jurisdiction of justices of the peace under the "Landlords and Tenants" act. *Id.*

LEASE. See EVIDENCE, 252.

Buildings on leasehold property, which, by the condition of the lease, may be removed by the lessee at the expiration of the term, may be sold and transferred as personalty. It is immaterial that the right of removal is conditioned upon the final fulfillment of the stipulations in the lease. *Dryden* et al. v. *Kellogg*, 87.

An undertaking by the assignee to pay the rents and taxes on leasehold property will constitute a sufficient consideration to uphold an assignment of the lease. *Id.*

An agreement in a lease dated March 25, 1852, to pay all taxes "that may be assessed, levied upon, or charged against" the leased property for twenty years, binds the lessee to pay the taxes for 1872, which were assessed prior to the expiration of the lease, though not levied until afterwards. *Waterman* et al v. *Harkness*, 494.

Where the lessor does not covenant to repair the demised premises, he cannot be made answerable in damages to the lessee for their being out of repair. *Joyce* et al. v. *DeGiverville* et al., 596.

LEVY.

As applied to taxation, the words "assess" and "levy" are not synonymous. *Waterman* et al. v. *Harkness*, 494.

LIBEL.

In Missouri libel is a criminal offense. *Brennan* v. *Tracy*, 540.

A corporation may be the subject of a criminal libel. *Id.*

Where words, which on their face appear harmless, have a covert meaning, implying an injurious effect, the libel may be as complete as if it were apparent in the common acceptation of the words. *Id.*

The question whether a publication calculated to affect the value of the stock in a banking corporation, and so to operate upon its business reputation, is libelous or not, cannot be determined by an examination of the assets and liabilities of the corporation. The true test is to be found in the market value of the stock. *Id.*

A printing and publishing corporation may be held liable in a civil action for libel. *Johnson* v. *St. Louis Dispatch Company*, 565.

To publish in writing an expression of belief that one has committed a felony is actionable *per se;* and the fact that the reasons for the belief

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LIBEL—*Continued.*

are also given will not affect the question, unless those reasons explain away the charge. *Id.*

The words "H. B. J., who disgraced the office now filled by H. C. E., was once accused of stealing a stud-horse. He sued the party of accusers, and at the trial a verdict was brought in for defendants, thus virtually saying that he did steal the horse." *Held*, libelous. *Id.*

LIENS. See CONTRACTS, 254.

After sale of land in a proceeding in partition, and the distribution of the cash payment therefor, a creditor of one of the parceners, having obtained judgment against him before a justice of the peace before the sale in partition, filed a transcript of the judgment in the office of the clerk of the Circuit Court, and asked the court to order payment of this judgment out of the share of the parcener in the proceeds of sale, and to give him the benefit of a lien thereon as of the day when the transcript was so filed. *Held*, that the creditor was entitled to the order asked for. *Pococke* v. *Bailey* et al., 118.

A public-school building, erected and used exclusively for the purposes of public education, is not subject to a mechanic's lien. *Hastings* v. *Woods* et al., 148.

Where one having a judgment which is a lien on real estate suffers the property to be sold under a deed of trust which was a prior lien, without getting out execution on his judgment, and the trustee under the deed of trust pays the surplus in his hands, after satisfying the notes, to the grantor in the deed of trust, the judgment creditor cannot recover in an action against the trustee, though he had notice of the judgment. *Warner* v. *Veitch*, 459.

Where the land is sold under a prior incumbrance, the lien is gone. *Id.*

A contracted to build a house for B, and bought the materials therefor from C, under a contract, the whole of which was furnished by C in December, 1870. Afterwards materials were purchased by A from C, for extra work. C filed a lien in June, 1871, for all the materials. *Held*, that it was too late as respects all articles furnished under the original contract. *Peck* et al. v. *Richardson* et al., 600.

LIMITATIONS, STATUTE OF. See BILLS OF EXCHANGE, 235; ACTIONS, 187; ADMINISTRATION, 52; LIENS, 600.

When the statute of limitations is pleaded against a set-off or counter-claim, the time must be computed from the commencement of the suit, and not from the filing of the answer. *Turnbull* v. *Watkins*, 235.

If a right of action to recover real estate accrued to a person under disability after February 2, 1847, then such person's right of action is forever barred, if suit be forborne for twenty-four years, notwithstanding such disability. *Dyer* et al. v. *Brannock* et al., 432.

If such disability continue for ten years or more, but less than twenty-four years, during which time suit is forborne, and, upon the removal of the disability, three years in addition elapse without suit, the bar is complete. *Id.*

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LIMITATION, STATUTE OF—*Continued.*

If interest be paid within ten years on a note which had been due for more than that period, the bar of the statute of limitations is thereby avoided. *Cocker* v. *Cocker*, 451.

Under the city charter of the city of St. Louis, of 1870 (sec. 16, Art. 8), an action upon a special tax-bill is barred two years after its issue. *City of St. Louis* v. *Edgar* et al., 595.

An action on a special tax-bill issued prior to March 4, 1870, not commenced within two years after March 4, 1870, is barred by section 16, Article 8, page 76, Session Acts 1870. *City of St. Louis to use* v. *Armstrong*, 599.

MALICIOUS PROSECUTION. See INSTRUCTIONS, 540.

In an action for malicious prosecution the issue is, not whether the plaintiff was guilty of the crime for which he was prosecuted, but whether the plaintiff had probable cause to believe him so. *Brennan* v. *Tracy*, 540.

The question of probable cause does not depend so much upon the real facts as upon the honest belief of the party prosecuting. Innocence of the suspected party is not necessarily inconsistent with an honest belief of his guilt. *Id.*

MANDAMUS.

The St. Louis Land Commissioner, having allowed an appeal from his decision, refused to make and certify a transcript of the proceedings, without prepayment, by the party appealing, of the cost of making said transcript. *Held*, that *mandamus* was the proper remedy to compel his official action. *State* ex rel. v. *Ryan*, 308.

Respondent made return to alternative writ; relator demurred; demurrer sustained. *Held*, that there was no foundation for an action for false return, and damages could not be assessed upon motion. *Id.*

Plaintiff obtained judgment against township board of education, as trustee to use of sub-district No. 8, on suit commenced under school law of 1870. Before judgment the school law of 1874 was enacted, vesting the title to the school property, formerly held by the township board as trustee of sub-district No. 8, in district No. 6, which was incorporated for that purpose, and succeeded to all the rights and property of sub-district No. 3. *Held*, that *mandamus* would lie to compel the board of directors of district No. 3 to direct their clerk to draw his warrant on the county treasurer, in favor of plaintiff, for the amount of said judgment and costs. *State* ex rel. v. *Foerstel* et al., 497.

MASTER AND SERVANT.

The question in cases of liability of the master for the acts of the servant is, not whether the act of the servant is negligent or willful, but whether it is done whilst engaged in the master's business, and within the scope of the servant's employment. *Eckert* v. *St. Louis Transfer Company*, 36.

When A employs B to do certain work for him, but does not in any way control or superintend him, he is not liable for injury to third persons, caused by the negligence of B. *Schweickhardt* v. *City of St. Louis* et al., 571.

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MECHANIC'S LIENS. See LIENS.

MORTGAGES AND DEEDS OF TRUST. See INSTRUCTIONS; EVIDENCE; ESTOPPEL; FRAUDULENT CONVEYANCES.

A conveyance of personal property, whether absolute or otherwise in form, and whether recorded or not, may be a good mortgage as between the parties; but, as to creditors of the grantor, if the instrument be on its face absolute, with nothing indicating an intent to create a mortgage, there must be a change of possession, within the terms of the statute, to make it effectual for any purpose. *State to use* v. *Bell* et al., 102.

An intent to hinder, delay, or defraud creditors is sufficient to invalidate a mortgage. It is not necessary that there be also combination and confederation between the mortgagor and mortgagee. *State to use* v. *Nauert* et al., 295.

Where part only of certain mortgaged property is taken in execution against the mortgagor, and the mortgagee gives notice of his claim, stating the value of all the property, whereupon the officer takes an indemnifying bond, reciting the value according to the notice, the obligors in the bond are not estopped by such recital, but may show that the property taken was of less value. *Id.*

Bringing suit on a policy of insurance, by the mortgagee, to whom the insurance was made payable, *held* to be a ratification of the contract. *Berthold* et al. v. *Clay Fire and Marine Insurance Company*, 311.

MOTIONS. See PRACTICE.

MUNICIPAL CORPORATIONS.

To render a city liable for an injury occasioned by the dangerous condition of a street or sidewalk, resulting from the negligence or malfeasance of private persons engaged in erecting or repairing buildings, such dangerous condition must be known to the city authorities, and they must have neglected to enforce the municipal regulations respecting persons so engaged. *Schweickhardt* v. *City of St. Louis* et al., 571.

In general, a city is liable for injuries resulting from the dangerous condition of a street or sidewalk only when that condition constitutes a nuisance. *Id.*

NEGLIGENCE. See MUNICIPAL CORPORATIONS, 571; EVIDENCE, 557; INSTRUCTIONS, 47.

Negligence of the plaintiff which does not directly contribute to the injury will not relieve the defendant from the consequence of negligence on his part which is the direct cause of the injury. *Eckert* v. *St. Louis Transfer Company*, 36.

Courts will not relieve parties from the consequence of their negligence in performing the conditions of contracts which they seek to enforce. *Moser* v. *Phœnix Mutual Life Insurance Company*, 408.

NEGOTIABLE INSTRUMENTS. See PROMISSORY NOTES; BILLS OF EXCHANGE; EQUITY, 490.

No instrument in writing, except a bill of exchange, not having the words "value received," is a negotiable instrument in Missouri. *Lowenstein* v. *Knopf*, 159.

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NEW TRIAL. See PRACTICE.

Where a motion for a new trial is made on the ground of newly-discovered evidence, it must appear that the existence of such evidence was not known to parties or their counsel in time for the former trial, or that the evidence was then inaccessible. *Graves* v. *Pegram* et al., 597.

The fact that counsel inadvertently overlooked the fact that depositions had been taken and filed by the other side, and in ignorance of the depositions went to trial, is no ground for granting a new trial. *Id.*

It is not error to refuse to grant a new trial where judgment has been rendered by default, owing to the neglect of counsel. *Meyer* v. *Southwestern Construction Company*, 599.

NONSUIT. See PRACTICE, 482.

NOTARIES PUBLIC.

Are liable to an action for damages for false certificate of acknowledgment of a deed, and it will avail them nothing to show that they were not aware of its falsity. *State to use* v. *Meyer* et al., 418.

NOTES. See PROMISSORY NOTES.

NOTICE. See CORPORATIONS, 299; ESTOPPEL, 295.

Acknowledgment of. See BAILEES, 58.

The purchaser of paper indorsed by an agent, if any circumstances are brought to his notice which would arouse the suspicions of a prudent man, will be held to inquiry as to the authority of the agent. *Edwards* et al. v. *Thomas* et al., 282.

Where a bond was delivered to A, signed by B, and not to be negotiated until also signed by A, and the fact that A's signature was essential to complete the instrument appeared on the face of the paper itself, a purchaser for value is held to be affected with notice of the agreement between A and B, and cannot recover in an action against B, if the bond is not also signed by A. *Fales* v. *Filley*, 345.

Notice to a director of a bank, of facts affecting the character of negotiable paper, is notice to the bank. *Clerks' Savings Bank* v. *Thomas* et al., 367.

Of appeal. See APPEALS, 598.

NUISANCE. See MUNICIPAL CORPORATIONS, 571.

When premises are occupied by a tenant, an agent of the owner cannot be proceeded against, under a municipal ordinance, for failing to remove a nuisance therefrom. *City of St. Louis* v. *Kaime*, 66.

Power given by charter to the mayor and council of the city of St. Louis "to provide by ordinance for the abatement of nuisances, and the preservation of the public health," will not sustain an ordinance made under color thereof, or authorize an interpretation of such an ordinance to an effect which would be in violation of the laws of the state. *Id.*

ORDINANCE. See NUISANCE.

PARENT AND CHILD.

When a man and woman cohabit, but no marriage ceremony of any kind

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PARENT AND CHILD—*Continued.*

takes place between them at any time, and a child is born of such intercourse, the fact that the father acknowledges the child as his does not legitimate the child, and the descendants of such child cannot claim property as the heirs of the father. *Dyer* et al. v. *Brannock* et al., 482.

PARTIES TO ACTIONS. See ACTIONS, 183, 187.

PARTITION. See LIEN, 118.

PARTNERSHIP. See ADMINISTRATION.

The common-law rights of a surviving partner are not interfered with by our probate statutes, except in so far as the latter operate to secure a fair settlement of the partnership affairs, and a just distribution of the assets. *Denny* v. *Turner*, 52.

A suit by a partner against his copartner, upon a claim not founded on the plaintiff's interest in the partnership assets, but arising from a direct violation of the articles of copartnership, need not be delayed for the taking of an account of the partnership affairs. *Stone* v. *Wendover, Admr.*, 247.

A partner satisfying a judgment against himself upon an indorsement made by his copartner, in violation of the articles, is entitled to reimbursement for the costs paid in such satisfaction, as well as for the amount of the judgment otherwise. *Id.*

Where, in an agreement of copartnership, no special provision is made for an allowance to either partner for personal services to be rendered about the business of the firm, it is not allowable to estimate the comparative values of such services rendered by the partners respectively, in a settlement of the account between them. *Kaiser* v. *Wilhelm*, 596.

PERSONAL PROPERTY. See CHATTELS.

PLEADINGS. See PRACTICE, 225.

Where the statute of limitations is pleaded against a set-off or counterclaim, the time must be computed from the commencement of the suit, and not from the filing of the answer. *Turnbull* v. *Watkins*, 235.

Interest cannot be allowed for a time prior to that claimed in the pleadings. *Id.*

In an action on covenant it is sufficient if the words used in the petition, either in their expressed intent or by necessary implication, show that a breach has been committed. *Stone* v. *Wendover, Admr.*, 247.

In a petition charging different violations of the same contract, in separate counts, it is unnecessary to repeat, in every count, the terms of the contract which are common to all, by way of inducement. *Id.*

The rule of evidence that a condition of things once shown to exist will be presumed to continue until the contrary appear may be equally applicable to a pleading, where the fact stated is in its nature continuous, and no limitation of time is suggested. *Id.*

Where a cause of action is imperfectly stated in the petition, it will be presumed, after verdict, that all essential facts were proved. *Berthold* et al. v. *Clay Fire and Marine Insurance Company*, 311.

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PLEADINGS—*Continued.*

A non-juridical day, on which no record can be kept, is not to be reckoned in calculating time for filing pleas or motions. *Clerks' Savings Bank* v. *Thomas* et al., 367.

Statement held insufficient to warrant a judgment by confession. *McHenry* v. *Shephard* et al., 378.

Advantage cannot be taken, in an appellate court, of an informality or defect in a pleading to which no objection was made in the trial court. *State to use* v. *Meyer*, 413.

A subscriber to the stock of a company cannot plead, in avoidance of his liability thereon, that he merely signed, at the request of the solicitor for the company, as an inducement for others to subscribe. *Pickering to use* v. *Templeton* et al., 424.

Where a petition sets out a representation and affirmation of certain facts, on the faith of which plaintiff received certain notes, this is sufficient to hold defendant as warrantor. No particular phraseology need be set out or proved; nor need the pleader charge in terms that defendant warranted the truth of his statements. *Smithers* v. *Bircher*, 499.

Where the petition shows that the time in which an action is barred has elapsed, the objection may be taken by demurrer. *City of St. Louis* v. *Edgar* et al., 595.

Statements of injuries to the person, and of injuries to property, resulting from the same wrongful act, are not statements of different causes of action. *Von Fragstein* v. *Windler*, 598.

PRACTICE. See NEW TRIAL; DAMAGES, 105.

APPELLATE COURTS.—Will not interfere with the action of a trial court in refusing to grant a divorce, when. *Dwyer* v. *Dwyer*, 17.

In an action on an insurance policy, where some of the plaintiffs became bankrupt after the commencement of the suit and before judgment, the fact that the assignee was not made a party is not a ground for a reversal. *Stillwell* et al. v. *Commercial Insurance Company*, 22.

Will not interfere with the action of trial court in accepting a juror, when. *Eckert* v. *St. Louis Transfer Company*, 36.

Will not disturb verdict when there is any evidence to support it. *Steiner* v. *Moran*, 47.

A bill of exceptions, signed after the close of the term in which the motion for new trial was overruled, without any stipulation or entry of record authorizing that proceeding, will not be noticed for any purpose. *Howes* v. *Holmes* et al., 81.

Where the evidence is conflicting, and is submitted to the jury with proper instructions, the verdict will not be disturbed by an appellate court—appellate courts will not weigh evidence. *Kempf* v. *Zeppenfeld*, 195.

Objections to the action of the trial court must be made to the trial court; else they will not be noticed on appeal or writ of error. *Stone* v. *Wendover, Admr.*, 247.

Effect given by the Court of Appeals to preponderance of evidence in a chancery case. *Keane* v. *Kyne*, 317.

Advantage cannot be taken, in an appellate court, of an informality or defect

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PRACTICE—*Continued.*

in a pleading to which no objection was made in the trial court. *State to use* v. *Meyer* et al., 418.

A verdict for damages which is demonstrably excessive will be set aside. *Carr* v. *Hibernia Insurance Company*, 466.

Where the appellant fails to file a transcript and prosecute his appeal, and the respondent files a transcript accompanied by a motion for affirmance, the motion will be sustained. *Slevin* et al. v. *Butler* et al.; *Ruse* v. *Olehausen; Thompson* v. *Barrett*, 595.

The objection that a referee does not appear to have been duly qualified before hearing the proofs, if not made in the trial court, will be presumed, on appeal, to be without foundation in the fact itself. *Kaiser* v. *Wilhelm*, 596.

The Court of Appeals will not notice points not made in the motion for a new trial. *Graves* v. *Pegram* et al., 597.

The allowance to a referee must be manifestly excessive to warrant the interference of the appellate court. *St. Louis Democrat Company* v. *Gray*, 597.

Where no testimony is preserved in a bill of exceptions, the judgment of the trial court will be affirmed. *King* v. *Lidwell*, 598.

A verdict will not be disturbed by an appellate court on the suggestion that it is against the weight of evidence. *Peck* et al. v. *Richardson* et al., 600.

Circuit Courts.—An adjudication of bankruptcy will not compel a stay of proceedings, in a suit against a bankrupt in a state court, upon motion and production of the certificate of adjudication. *Howes* v. *Holmes* et al., 81.

A purchaser of personal property is not required, before proceeding against his vendor upon the warranty of title, to wait for an actual deprivation by the true owner. He may surrender the property voluntarily, but must be then able to show conclusively that his surrender was to the paramount owner. *Dryden* et al. v. *Kellogg*, 87.

An entry of judgment on the assessment of damages by a jury in a suit upon a penal bond, which is not in the proper form for such a judgment, cannot be amended by a subsequent entry of judgment. *St. Louis Domicile and Savings Loan Association* v. *Augustin*, 123.

It is error to instruct the jury what articles were, and what were not, sold at a public sale. *State to use* v. *Jacob*, 183.

Affidavits in support of a motion for a new trial on account of newly-discovered evidence will be disregarded if they show that nothing but gross negligence prevented the party from knowing, before the trial, the matters alleged to be newly discovered. *Kempf* v. *Zeppenfeld*, 195.

A motion, made for the first time during the trial, to dismiss a suit for want of security for costs was properly overruled. *Cator* et al. v. *Collins* et al., 225.

Where the petition charges fraud in fact in respect of a deed, and the deed is fraudulent in law, the evidence as to fraud in fact being conflicting, and the finding of the court is for the plaintiff generally, there is no reason for saying that there is a want of correspondence between the allegations and the proofs. *Id.*

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PRACTICE—*Continued.*

A motion to suppress or exclude a deposition for want of notice of the taking of it, made for the first time at the trial of a cause, the deposition having been on file for more than nine months, there being a rule of court requiring that all exceptions for such cause should have been filed more than six months before, was properly overruled. *Id.*

Where the parties, in a settlement, have agreed upon the value in United States currency of a certain sum in foreign money, no further evidence is necessary to enable the jury to make a like estimate, in readjusting the settlement to the rights of the parties, and in ascertaining what amount was overpaid. *Turnbull* v. *Watkins*, 235.

A jury cannot properly allow interest from a date prior to that from which the party claims it in pleading. *Id.*

When there are two or more counts or demands in a petition, and the verdict is for a gross sum, the objection thereto must be made in the trial court; otherwise, it will not be noticed on appeal or writ of error. *Stone* v. *Wendover, Admr.*, 247.

It is not essential to the defense of set-off or recoupment that the defendant ask for an affirmative judgment against the plaintiff. *Wagner* v. *Dette* et al., 254.

Where a referee finds as a fact that a financial agent has grossly neglected his duty by failure to keep proper accounts and vouchers, it is error to allow him his salary. *Smith* v. *Crews*, 269.

The payee and holder of a note indorsed in full to a third party is not on that account obliged to prove ownership. *Wickersham* v. *Jarvis* et al., 279.

Respondent made return to alternative writ; relator demurred; demurrer sustained. *Held*, that there was no foundation for an action for false return, and damages could not be assessed upon motion. *State* ex rel. v. *Ryan*, 303.

It is error to compel a defendant to elect between two defenses when both may be true. Such election can be compelled only when, if one defense be true, the other must necessarily be false. *Keane* v. *Kyne*, 317.

Where the trial of an issue of fact requires the examination of an account, it is error to refer it, against the objection of one of the parties, where the account is clearly not a long one. *Dooley* v. *Bunker*, 325.

A non-juridical day is not to be reckoned in calculating time for filing pleas. *Clerks' Savings Bank* v. *Thomas* et al., 367.

Courts of justice cannot relieve parties from the consequences of their own neglect to perform the contract which they seek to enforce against others. *Moser* v. *Phœnix Mutual Life Insurance Company*, 408.

A sued several defendants jointly in ejectment, setting up separate holdings. He was ordered to elect against whom he would proceed, and did so, dismissing as to the others, and saving no exceptions to the order. Afterwards he became a nonsuit on another matter, which was set aside by the court in general term. *Held*, that, upon the cause being remanded to special term for trial, it was not competent for A to proceed against those defendants as to whom he had dismissed before becoming nonsuit. *Dyer* et al. v. *Brannock* et al., 432.

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PRACTICE—*Continued.*

Where an appeal was taken on the day judgment was entered, but by mistake of the justice the judgment was entered as if rendered two days before the appeal, and leave was granted in the Circuit Court to have the certificate of the justice made to conform with the facts, it is error to dismiss the appeal, for want of prosecution, until the cause has been regularly reached for trial in the order of the docket, and an opportunity given to appellant to show the true date of the judgment. *Raum* v. *Eyermann*, 476.

The time granted for argument is a matter within the discretion of the trial court; and this court will not interfere unless it is clear that that discretion has been abused. *Silver* et al. v. *Hale*, 557.

It is within the discretion of the court to require a witness to answer a question the answer to which may degrade him. *Ring* v. *Jamison, Admr.*, 584,

In a suit against an administrator, who was present defending during the trial, and waived notice of demand in the Probate Court, it is too late, after verdict, to object that no formal proof that he was administrator was made. *Ring* v. *Jamison, Admr.*, 584.

Where no assignment of errors and no statement and brief are filed by appellants, the appeal will be dismissed. *Haskell* v. *Saylor; Goosens, Exr.*, v. *Sutter; Gates* v. *Hubbard*, 595.

If the lapse of time in which an action is barred appears upon the face of the petition, the objection may be taken by demurrer. *City of St. Louis* v. *Edgar* et al., 595.

A motion to retax costs, unaccompanied by a copy of the bill, or the items complained of, will be overruled. *St. Louis Domicile Savings and Loan Association* v. *Augustin*, 596.

Where the parties frame and go to trial upon issues directed to a particular matter of fact, which issues are found against the defendant, if the court receives other evidence not warranted by the pleadings, the tendency of which is to show that, notwithstanding the finding, the plaintiff ought not to recover, the proper course is to make an order "*quod partis replacitent*," and not to give judgment for the defendant upon such a record. *Quinlin* et al. v. *Keiser* et al., 597.

It is not error to entertain exceptions to a referee's report not filed within the time prescribed by law. *St. Louis Democrat Company* v. *Gray*, 597.

In an action for tort, defendant has no right to demand a bill of particulars. *Von Fragstein* v. *Windler*, 598.

The fact that the defendant in a proceeding under section 53, Article 5, chapter 110, of Wagner's Statutes, is a municipal corporation does not exempt it from the order contemplated by that section. *Walser* v. *City of St. Louis*, 600.

If defendant, having sold goods and chattels to plaintiff, instead of delivering, destroys them, plaintiff may waive the tort and sue for the value of the goods not delivered. *Deichman* v. *Brueggestradt*, 601.

PRESUMPTIONS. See PRACTICE, 596.

Where a cause of action is imperfectly stated in the petition, it will be pre-

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PRESUMPTIONS—*Continued.*

sumed, after verdict, that all essential facts were proved. *Berthold* et al. v. *Clay Fire and Marine Insurance Company*, 311.

Where goods are lost by a common carrier, whatever may have been the agreement with the shipper, the law will presume that they were lost through the fault of the carrier, unless the carrier show the contrary. *Kirby* et al. v. *Adams Express Company*, 369.

In case of a sheriff's deed seventy years old, though the record of the deed does not show a seal, yet where the deed has been followed by undisturbed possession a seal will be presumed. *Dinges* v. *Kearney* et al., 515.

After the lapse of seventy years the issuing of necessary process and service will be presumed, to support a judgment of such antiquity. *Id.*

Where the pleadings upon which the cause was tried do not appear in the transcript of the record, all presumptions are in favor of the action of the trial court, and the judgment will be affirmed. *Central Savings Bank* v. *Bellefontaine Railway Company*, 601.

PRINCIPAL AND AGENT. See INSURANCE; LANDLORD AND TENANT, 66.

Evidence of former transactions by an agent, similar to the one in controversy, is admissible as tending to show the extent of his authority, when there is other evidence tending to prove that such transactions were known and approved by the principal at the time of their occurrence. *Morse* v. *Diebold* et al., 163.

If a principal knowingly allow his agent to indorse and discount notes, taken in the course of business, with the name of the principal, and take no steps to make known that the agent has no authority so to do, he will be liable on an indorsement so made by the agent. *Id.*

It was not erroneous to refuse an instruction to the effect that "authority given to an agent to discount at one place, or with one person, does not imply the authority to discount at another place, or with another person," when the only tendency of the testimony, if any, was to prove a general authority to discount at all places and with all persons, as occasion might require. *Id.*

No assignment from an agent is necessary to enable the principal to sue upon a contract made for his benefit by the agent. *Turnbull* v. *Watkins*, 235.

Gross misconduct of financial agent, in the matter of keeping accounts, forfeits all right to compensation. *Smith* v. *Crews*, 269.

If one who has authority to sign and indorse mercantile paper for another, without authority makes or indorses paper for the accommodation of a third party, the purchaser of such paper will be held to inquiry as to the authority of the agent, if any circumstances are brought to his notice which would arouse the suspicion of a prudent man as to the authority of the agent. *Edwards* et al. v. *Thomas* et al., 282.

The fact that the agent's name in such case appears as last indorser on the paper is a circumstance strongly indicating that the paper was made for his benefit, and the proceeds to go to him. *Id.*

The failure of the agent of a corporation to deliver to the corporation the

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PRINCIPAL AND AGENT—*Continued.*
original subscription paper will not discharge those who had signed that paper. *Pickering to use* v. *Templeton* et al., 424.
When A employs B to do certain work for him, but does not in any way control or superintend him, he is not liable for injury to third persons, caused by the negligence of B. *Schweickhardt* v. *City of St. Louis* et al., 571.

PROMISSORY NOTES. See EVIDENCE. PRINCIPAL AND AGENT.
The payee and holder of a note indorsed in full to a third party is not on that account obliged to prove ownership of the note. *Wickersham* v. *Jarvis* et al., 279.
A and B were co-executors of C. Money came into the hands of A, which he temporarily committed to B, taking his note, by which B promised to pay the amount to A, with interest. *Held*, that, in a suit on the note, it was no defense that the money belonged to the estate of C. *Cocker* v. *Cocker*, 451.
One who takes negotiable paper before maturity, as security for an antecedent debt, takes it subject to the equities between the parties. *Brainard* et al. v. *Reavis* et al., 490.

PUBLIC LANDS.
There being an interference between two approved surveys made by the United States, one made in 1851, of a confirmation made by the old board of commissioners in 1810, and the other in 1817, of a confirmation made of a lot in the common field of St. Louis by the 2d section of the act of April 29, 1816, *held*, that the title under the survey, made in 1851, of the confirmation made in 1810 was the better, for two reasons: 1. Because the survey of 1851 had relation to the confirmation of 1810, and so was prior to the confirmation of 1816. 2. Because the express terms of the act creating the confirmation of 1816 excludes from its operation whatever had been previously confirmed by the board of commissioners. *Tyler* v. *Wells* et al., 526.

RAILROADS. See CORPORATIONS.

RAILROADS, STREET.
Section 3 of an act of the General Assembly provides: "No street railway shall hereafter be constructed * * * nearer to a parallel road than the third parallel street from any road now constructed, or which may hereafter be constructed, except the roads hereinbefore mentioned." *Held*, that the true interpretation permits the construction of a railway nearer than the third parallel street from one of "the roads hereinbefore mentioned;" but forbids such construction within that distance from any other. *St. Louis Railroad Company* v. *Northwestern St. Louis Railway Company*, 69.

RATIFICATION. See INFANTS, 584; INSURANCE, 311.

REAL PROPERTY. See PUBLIC LANDS; SALES.

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RECORDS.

To make a record valid on its face it is only necessary that it should appear that the court had jurisdiction of the action and the parties, and that a judgment has in fact been rendered. All else is merely formal. *Pickering to use* v. *Templeton* et al., 424.

RECOUPMENT. See SET-OFF.

REFEREE.

When the trial of an issue of fact requires the examination of an account, it is error to refer it, against the objection of one of the parties, when the account is clearly not a long one. *Dooley* v. *Barker*, 327.

Where distinct issues are made in the pleadings, a referee has no authority to go beyond them and report a right of recovery in either party upon a claim which neither has asserted in the record. *Kaiser* v. *Wilhelm*, 596.

The allowance to a referee must be manifestly excessive to warrant the interference of the appellate court. *St. Louis Democrat Company* v. *Gray*, 597.

REPLEVIN. See EVIDENCE, 329.

The plaintiff in a replevin suit is jointly liable with the officer for a trespass committed in executing the process. *Dowell* et al. v. *Taylor* et al., 329.

The statutory bond in a replevin proceeding is no protection to the officer against the claims of persons having no interest in the controversy. *Id.*

RES ADJUDICATA.

Where a bank holds a note against a depositor at the time of his death, which is larger in amount than the sum on deposit, and the bank presents its claim to the Probate Court and has a balance struck between the accounts, such allowance is *res adjudicata*. *Knecht, Admr.*, v. *United States Savings Institution*, 563.

SALE AND DELIVERY.

Of personal property in the vendor's possession implies a warranty of the title. *Dryden* et al. v. *Kellogg*, 87.

SALES. See FRAUDULENT CONVEYANCES, 241; PERSONAL PROPERTY; CONVEYANCES, 102; CHATTELS.

What memorandum of sale, by sheriff acting as trustee, is evidence of contract of sale. *Barclay* et al. v. *Bates*, 139.

Memorandum relating to sale made by sheriff, acting as trustee under deed of trust, need not be made by the deputy who made the sale. *Id.*

If such memorandum is made on the day of, and shortly after, sale, and is otherwise sufficient, it will satisfy the statute of frauds. *Id.*

The court cannot declare in an instruction what articles were sold, or not sold, at a public sale. *State to use* v. *Jacob*, 183.

The ground upon which courts of equity extend protection in case of a sale by expectant heirs and reversioners. *Jaeschke* v. *Reinders*, 212.

What acts of the vendor will constitute a complete transfer of ownership of personal property. *Dowell* et al. v. *Taylor* et al., 329.

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SALES—*Continued.*

Where one purchases real estate from another having the legal title, and without notice of any equitable title outstanding to the same, the mere fact that the purchase money was only partly paid in cash will not suffice to give the equitable owner any claim to the property as against the *bona fide* purchaser of the legal title. *Digby* v. *Jones*, 599.

Where a trustee sells property in his hands without any notice to the equitable owner, and without giving the owner an opportunity to redeem, he will be held to account for the property at its highest market value. *Jones* v. *Real Estate Savings Institution* et al., 599.

Where there has been a sale of personalty in good faith, followed immediately by open and notorious possession by the vendor, the sale cannot be disturbed by creditors of the vendor. *State to use* v. *Schuchmann*, 599.

Exclusive possession by the vendee for a year and a-half is enough to satisfy the statute as to time. *Id.*

SEAL.

When a conveyance will be presumed to have been sealed. *Dingee* v. *Kearney* et al., 515.

SET-OFF AND COUNTER-CLAIM.

Where the intestate employed attorneys to bring a suit which was pending at the time of his death, and then revived in the name of his administrator, *held*, in a suit against the attorneys for the proceeds of the suit collected against them, that they could not offset their claim for professional services rendered to the intestate during his life-time, but were entitled to recover, as a set-off, the reasonable value of the services rendered to the administrator in prosecuting the suit after the intestate's death. *Lewis, Admr.*, v. *Kinealy* et al., 33.

A counter-claim founded on *quantum meruit*, with a detailed account of items and separate charges, is not sustained by proof of a special contract fixing a lumping compensation for all the items together. *Reed* et al. v. *Peper Tobacco Warehouse Company*, 82.

If a corporation, collecting fees for tobacco inspectors, collect more than is allowed by law, and pay over the same, such over-payments cannot be set up as a counter-claim in a suit for fees collected and not paid over. *Id.*

When the statute of limitations is pleaded against a set-off or counter-claim, the time must be computed from the time of the commencing of the suit, and not from the filing of the answer. *Turnbull* v. *Watkins*, 235.

It is not essential to the defense of either set-off or recoupment that the defendant ask for an affirmative judgment against the plaintiff. *Wagner* v. *Dette* et al., 254.

SHERIFF. See CONSTABLES.

Acting as trustee under a deed of trust, sells as sheriff, not as auctioneer, and the memorandum of such sale need not be made by the deputy who made the sale. *Barclay* et al. v. *Bates*, 189.

SPECIAL TAXES. See ST. LOUIS, CITY OF; DEDICATION, 387.

A judgment on a void special tax-bill is not a bar to an action on an amended and correct bill for the same work. *Prendergast* v. *Richards*, 187.

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SPECIAL TAX—*Continued.*
Where the contract on which the tax-bill is issued embraces work outside the sewer district, the city engineer can compute the whole cost of so much of the sewer as was within the district, assess it as a special tax, and issue tax-bills against the respective lots in the district. *Id.*
A personal judgment cannot be rendered thereon, but an executor entitled to the possession of real estate is a proper party to a suit on a special tax-bill affecting such estate. *Id.*
On the authority of *Heagele* v. *Mallinckrodt*, *held*, that the title to real estate was not involved in this action on special tax-bills, and an appeal to the Supreme Court would not lie. *Skrainka* v. *Allen*, 387.
A special tax-bill issued by the city of St. Louis, which fails to show the dimensions of the lot charged, and especially its frontages, which is silent respecting the whole value of the work done, and the relation of the frontage of the particular lot to that of all the frontage of the lots chargeable with the whole cost, is not a compliance with the requirements of the charter, and is not evidence for any purpose. *Carroll* v. *Eaton*, 479.
When an action upon a special tax-bill is barred. *City of St. Louis* v. *Edgar* et al., 595; *City of St. Louis to use* v. *Armstrong*, 600.

STATUTES, CONSTRUCTION OF. See APPEALS, 595; CONSTITUTIONAL LAW; CORPORATIONS; EXEMPTIONS; FACTORS AND BROKERS; JUDGMENT BY CONFESSION; JUSTICES OF THE PEACE; LANDLORD AND TENANT, 266; LIMITATIONS, 599; RAILROADS, STREET, 69.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STOCK. See CORPORATIONS.
Shares of stock in a corporation are goods, wares, and merchandise, within the meaning of the statute of frauds, so as to require a note or memorandum in writing to validate a sale. *Fine* v. *Hornsby*, 61.

STOCKHOLDERS. See CORPORATIONS.

ST. LOUIS, CITY OF. See NUISANCE, 66; MUNICIPAL CORPORATIONS, 561; JUDGMENTS, 571.
Where the city of St. Louis issued bonds to G. for the purchase money of land to be used for Forest Park, and G. sold the same to J., *held*, that G. was estopped to deny their validity, and that J. was entitled to be paid therefor out of the assessed value of the land. *Jamison* v. *Griswold*, 150.
The fact that a portion of a sewer runs through property of defendant not condemned for that purpose is not a bar to a recovery upon a special tax-bill for that portion of the sewer built on that part of his premises regularly condemned. *Miller* v. *Anheuser*, 168.
Where the city charter provides for the construction of sewers where the council deem necessary, the passage of an ordinance to construct a sewer is conclusive as to the necessity for the sewer. *Id.*

STREETS. See MUNICIPAL CORPORATIONS.
What is evidence tending to show a dedication of land for a public street. See DEDICATION, 387.

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STREETS—*Continued.*

There is a legal distinction between a hole or pit occasioned by the subsidence of the soil, or the decay of the materials of which a street or sidewalk is composed, and an excavation which is a necessary part of an improvement. *Schweickhardt* v. *City of St. Louis* et al., 571.

TAXES.

The words "assess" and "levy," as applied to taxation, are not synonymous. *Waterman* et al. v. *Harkness*, 494.

TENDER. See INSURANCE, 262.

TESTIMONY. See EVIDENCE.

TITLE.

A warranty of is implied by a sale and delivery of personal property in the hands of the vendor. *Dryden* et al. v. *Kellogg*, 87.

Action to quiet. See PRACTICE, 600.

TORT. See ACTIONS, 601.

The defendant has no right to demand a bill of particulars in an action for a tort. *Von Frgastein* v. *Windler*, 598.

TRESPASS.

The plaintiff in a replevin suit is jointly liable, with the officer, for a trespass committed in executing the process. And the statutory bond in such proceedings is no protection to the officer against the claims of persons having no interest in the controversy. *Dowell* et al. v. *Taylor* et al., 329.

When instructions as to exemplary damages may be given in a case of trespass. See DAMAGES, 402.

TRUSTEES. See SALES; ACTIONS, 183, 459; CLERKS, 595; LANDLORD AND TENANT, 266; MANDAMUS, 497.

A suit on the account of the taking of personal property, held under a deed of trust, is rightly brought in the name of the trustee. *State to use* v. *Jacob*, 188.

Right of action as between a judgment creditor and a trustee under a deed of trust. See LIENS, 459.

UNLAWFUL DETAINER.

Where there is no evidence that plaintiff ever had possession of the premises in dispute, it is error to refuse to set aside a verdict for plaintiff in a proceeding for an unlawful detainer. *McElhinney* v. *Atwell*, 598.

USURY.

Where a corporation is, by its charter, authorized to make an usurious contract, and where no instruction as to usury was asked or given the jury, and where usury was not pleaded, a verdict will not be disturbed because the evidence discloses usury. *St. Louis Domicile and Savings Loan Association* v. *Augustin*, 123.

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USURY—*Continued.*

Where no issue of usury or no usury has been found, it is perfectly immaterial, as affecting plaintiff's right to recover the full amount due on a note and costs, what the evidence may show as to the amount of interest paid or agreed upon. *Wickersham* v. *Jarvis* et al., 279.

VARIANCE. See PRACTICE, 225.

VENDEE AND VENDOR. See SALES.

VERDICT. See PRACTICE.

Will not be disturbed when there is any evidence to support it. *Steiner* v. *Moran*, 47.

The finding of a jury is conclusive when the testimony on opposite sides of a material issue is flatly contradictory. *Morse* v. *Diebold* et al., 168.

A verdict for damages which is demonstrably excessive will be set aside. *Carr* v. *Hibernia Insurance Company*, 466.

In an action against A, B, and C, a verdict finding the issues against A and B, and saying nothing as to C, should not be received. *Schweickhardt* v. *City of St. Louis* et al., 571.

Where there is no evidence that plaintiff ever had possession of the premises in dispute, it is error to refuse to set aside a verdict for plaintiff in a proceeding for an unlawful detainer. *McElhinney* v. *Atwell*, 598.

WAIVER. See INSURANCE.

WARRANTY.

A liability upon breach of warranty is a "debt" within the meaning of the statute which provides for suits against stockholders in the event of dissolution of a corporation. *Dryden* et al. v. *Kellogg*, 87.

A sale and delivery of personal property in the vendor's possession implies a warranty of the title. *Id.*

A purchaser of personalty is not required, before proceeding against his vendor upon the warranty of title, to wait for an actual deprivation by the true owner. *Id.*

The measure of damages, upon breach of warranty of title, is the amount of the purchase money, with interest, and expenses necessarily incurred in the defense of the failing title. *Id.*

A liability upon a breach of warranty is a "debt." *Id.*

Where a representation is made of a material fact, which was understood at the time and accepted as a warranty, this is sufficient to hold the vendor, though in good faith and innocently mistaken. *Smithers* v. *Bircher*, 499.

Where defendant sold certain real estate notes, indorsing them without recourse, and saying they were well secured, and first liens on real estate, and the notes were accepted by plaintiff on the faith of these representations, *held*, that defendant was liable as warrantor. *Id.*

What allegations in a petition are sufficient to hold defendant as warrantor. *Id.*

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WILLS.

A man may freely dispose of his property while he lives, but at his death the law takes it in charge, and subjects his testamentary dispositions to the prior claims of creditors. *Eoff* v. *Tompkins* et al., 464.

WITNESSES.

Counsel may sometimes ask a witness a question the answer to which may degrade him, but it is in the discretion of the court to require an answer. The court may also, under certain circumstances, forbid such questions to be asked. *Ring* v. *Jamison, Admr.*, 584.

A witness cannot be cross-examined as to irrelevant facts merely to discredit his testimony by contradictory testimony. *State to use* v. *Schuchmann*, 599.

WRIT OF ERROR. See APPEALS.

A writ of error cannot be sued out to take a cause to the Court of Appeals, where a judgment has been rendered by the general term of the St. Louis Circuit Court reversing the action of the special term. *Minot, Exr.*, v. *Kaime*, 597.

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